

restaurants and other eating places. Thus, premises whose principal business is the serving of alcoholic beverages would be recognized frankly for what they are. They would continue to qualify for liquor or beer licenses, to be known as tavern licenses, and undesirable activities would continue to be specifically prohibited by other provisions of law. The law would be changed to permit modified food requirements appropriate for tavern licensees.

- The restaurant license would be preserved in the law for those premises whose principal business in fact is the serving of meals.
- To provide an orderly transition period, applications for tavern licenses by persons not now holding restaurant licenses should be limited or even prohibited for one year. During this transition period, present licensees would be allowed to convert to a tavern license.

B. *Package Store Restrictions*

1. *Commission Findings.* The Moreland Commission findings indicate that:

- No new package store licenses have been issued in New York State since the "moratorium" of 1948. In that period the population of the State has increased sharply and new residential centers have grown. Concurrently with these changes in population, per capita consumption of alcohol has increased substantially.
- This sales growth has resulted in many package store owners profiting not from their own business efforts, but from the windfall of restricted competition. Many persons desiring to enter the field have been unable to do so since no new licenses have

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been issued since 1948. These factors have combined to create a substantial artificial market dealing in "keys" to existing package stores, at prices which frequently have been astounding.

- The moratorium has resulted in a tremendous premium on the privilege of moving a package store from one location to another. The administrative decisions to allow or disallow these moves have been arbitrary and inconsistent. No useful purpose can be served in permitting the continuance of "removal" restrictions which defy rational decision-making.
- Other provisions of the present law are out of place in a free enterprise system. They grant unwarranted protections against competition to the package store industry.
- One example is the statutory requirement that package stores on the same street must be located at least 1500 feet from each other in New York City, and at least 700 feet elsewhere in the State. No one seems able to explain how these distances were originally determined. In any event, careful studies now show that there is no discernible connection between temperate and lawful behavior and the establishment of such arbitrary and compulsory distances between package stores. These distance requirements have no present purpose except to restrict competition.
- Two more anomalous statutory restrictions are the limitation of one license to an individual and the provision that package stores may sell only wine and liquor. Experience has not shown either of these provisions to have any special merit in promoting temperance and respect for law. Experience

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in other states has shown that the absence of such provisions produces no adverse effect upon temperance or law-abidance.

—People have come to expect the convenience and efficiencies of modern marketing methods and of open competition. There is no reason why citizens should be denied these benefits in the alcoholic beverage field.

2. *Commission Recommendations.* On the basis of its findings the Moreland Commission has recommended legislation that would:

—Eliminate the distance now required to exist between package stores, without changing, however, the prohibition against liquor stores within 200 feet of churches and schools.

—Provide that anyone who meets the objective standards of existing law (such as good character, the absence of a criminal record and financial responsibility) should be granted a license. The license would attach to the licensee rather than to the premises, and a licensee would be allowed to operate more than one outlet. Licenses would be automatically renewable each year, unless terminated for cause.

—Allow licensees to sell items other than liquor and wine, provided that they are sold only in areas completely separated physically from the liquor and wine department. Sodas and other mixes, however, could be sold in the same department as alcoholic beverages. The requirement of a physically separate department would continue the protection against possible unlawful sales.

—To put these changes into effect in an orderly way, end the "distance" and "removal" rules immediately.

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No new licenses would be issued for one year. During that year, present licensees would be permitted to move their premises to shopping centers or any other location in the State which complies with local zoning ordinances, and is not within 200 feet of a church or school. Present licensees would also be allowed immediately to carry non-alcoholic beverages commonly associated with the consumption of liquor.

—Under this transition period, make available, one year from the effective date of these new laws, 500 licenses for qualified applicants paying an initial fee of \$5,000 each. The following year an additional 500 would be made available at an initial fee of \$2,500. If there are more qualified applicants than licenses, the 500 each year would be selected by a public drawing. After this three-year transition period, any applicant who meets the requirements would be entitled to a license upon payment of a \$1,000 initial fee.

C. Distiller-Fixed Consumer Prices

1. *Commission Findings.* The Moreland Commission's findings indicate that:

—Under the present law, the State Liquor Authority enforces minimum retail prices of packaged liquor. These prices, however, are fixed not by the Authority but by the distillers themselves and are not subject to any review by the Authority in the public interest.

—This provision of the law originated in 1945. Its justification was said to be a fear that the "price wars" which occurred just prior to World War II would reoccur after the War's end, with alleged

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disastrous results to package store owners, and, so it was said, to New York and its citizens as well.

—Actually the State Liquor Authority believed that discriminatory favoritism by distillers and wholesalers was primarily responsible for occurrence of the "price wars." Yet these same distillers were given the sole and exclusive right to fix prices. This unique right was combined with the threat that any package store owner who attempts to pass on to his customers, through lower prices, the benefits of efficient operation will be faced with the suspension or loss of his license by administrative action of the State Liquor Authority.

—Such a compulsory resale price maintenance is at war with the American system of free competition.

—The result is that New York consumers have been compelled to pay on the average \$1 more per fifth of liquor than they would have to pay if there were a free market. This price difference is not explained by differences in excise taxes, fees and retail operating costs. The total bill for this surcharge foisted on New Yorkers now runs to \$150 million a year and it is rising every year.

—This present system of price control has no significant effect upon the consumption of alcoholic beverages, upon temperance or upon the incidence of social problems related to alcohol.

—If the industry feels that it must have price-fixing, the provisions of the Feld-Crawford Law are available to it as to any other business. Under that law voluntary price-fixing agreements between distributors at successive levels can be enforced in the

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courts by private litigation. Moreover, other present provisions of law prohibit price discrimination in sales to liquor wholesalers and retailers—a major weapon against "price wars."

2. *Commission Recommendation.* On the basis of its findings, the Moreland Commission recommends that:

—Section 101-c of the Alcoholic Beverage Control Law—which compels the State Liquor Authority to maintain resale prices set by the distillers—should be repealed.

Conclusion

The recommendations of the Moreland Commission call for forthright decisions and action. The system which has developed under the law during the past thirty years has necessitated individual and subjective judgments—in too many cases arbitrary, discriminatory and capricious—thus opening the door to repeated instances of corruption and loss of public confidence.

Together we must act responsibly to rectify these errors of the past. The major recommendations of the Moreland Commission are in effect in other states. With determined action now, this State can have sound liquor control laws, honest enforcement, fairness to those in the liquor business, justice to the consuming public—and at the same time an atmosphere of temperance and respect for law.

/s/ NELSON A. ROCKEFELLER

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GOVERNOR'S MESSAGE TO LEGISLATURE
ON
ALCOHOLIC BEVERAGE CONTROL LAW
AMENDMENTS

April 16, 1964

To THE LEGISLATURE (In Extraordinary Session):

I have called your Honorable Bodies into Extraordinary Session and pursuant to provisions of Article IV, Section 3, of the Constitution, I submit for your consideration and action liquor reform legislation pertaining to the following subjects:

(1) The repeal of Section 101-e of the Alcoholic Beverage Control Law, the provisions under which manufacturers and wholesalers fix minimum consumer resale prices for liquor, and the enactment of

(a) amendments to Section 101-b of the Alcoholic Beverage Control Law to make it clear that its only purpose is to prevent each distiller from discriminating in price between wholesalers and each wholesaler from discriminating in price between retailers, and to remove any question that it might permit a distiller to fix the price charged by a wholesaler or a wholesaler to fix the price charged by a retailer,

(b) a provision that each distiller or wholesaler must certify that the price charged in New York for its brand of liquor is at least as low as the price charged in any other state or Washington, D. C., with false certification

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to be a misdemeanor and a basis, upon conviction, for a refusal to permit the brand of liquor to be sold in the State for a period not exceeding three months,

(c) a prohibition against the retail sale of liquor below cost, and

(d) an amendment to the present prohibition against beer price advertising to include liquor price advertising.

(2) The repeal of the provisions of the Alcoholic Beverage Control Law mandating minimum distance requirements between retail stores licensed to sell for off-premises consumption, but retaining the present minimum distance requirements between such a retail store and a church or school.

(3) The repeal of the unrealistic food requirements for bars and grills, and the enactment of

(a) provision for a class of license for on-premises consumption, to be called a "special on-premises" license, and the qualifications and conditions for such licenses,

(b) a requirement that "special on-premises" licensees have only simple foods available for sale to customers, with the State Liquor Authority barred from requiring that receipts from food sales be substantial or a fixed percentage of total receipts from all sales, and

(c) an amendment of the local option provisions to permit voters in a locality to vote with respect to sales at retail for consumption on the premises of "special on-premises" licensees.

(Signed) NELSON A. ROCKEFELLER

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IN THE SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

AFFIDAVIT OF FREDERICK J. LIND IN SUPPORT OF MOTION

State of New York,
County of New York, ss:

FREDERICK J. LIND, being duly sworn, deposes and says:

I am Vice President and General Counsel of Joseph E. Seagram & Sons, Inc., an Indiana corporation with its principal office and place of business at 375 Park Avenue, New York, New York. I am making this affidavit in support of the motion for a temporary injunction and for a stay pending the hearing and determination of that motion.

Joseph E. Seagram & Sons, Inc., through its wholly owned subsidiary, The House of Seagram, Inc., sells liquor in all states of the United States (with the exception of Mississippi) and in the District of Columbia.

The principal brands sold by Seagram's are Seagram's 7 Crown, Seagram's V.O., Seagram's Gin, Lord Calvert, Calvert Extra, Calvert Gin, Four Roses and Kessler. The House of Seagram, Inc., through its importing divisions, also sells Chivas Regal Scotch, White Horse Scotch, Ronrico Rum, Martell Cognac and Noilly Prat Vermouth. The House of Seagram, Inc. sells as well a large number of domestic and imported brands in addition to those mentioned above.

A substantial part of the products of Joseph E. Seagram & Sons, Inc. are sold in the State of New York.

In many states the price at which Seagram products are sold to wholesalers is not required to be fixed for any specific time period, such as is required by New York and other posting states. In these markets, field supervisors are given considerable freedom to vary the price from time to time depending upon competitive pressures.

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The recent amendment of the New York Alcoholic Beverage Control Law, Chapter 531 of the Laws of 1964, Section 9(d), will require Seagram's to file, in conjunction with its schedule of prices, an affirmation that the prices at which it sells brands to wholesalers in New York State are no higher than the price at which it sells those same brands in other states and no higher than the price at which some "related person" sells the same brands in any other states. Paragraph (f) of Section 9 of the new law imposes a similar requirement on sales between wholesalers and retailers, but it is unclear precisely who is to file the affirmation under (f). It does appear, however, that Seagram's, either as a brand owner or wholesaler designated as agent, will be required to verify the material contained in affirmations submitted under both paragraphs (d) and (f).

In order to affirm that our prices to wholesalers and retailers in New York are no higher than the lowest price at which our brands are sold by "related persons" in any other state we must determine first who is a "related person", secondly, we must determine what is the "price" during the specific one-month period of time at which such "related persons" sell to wholesalers and retailers. These are simple questions for which we have no simple answers. It will in fact be impossible for Seagram's to answer these questions at all. The definition of "related persons" found in both paragraphs (d) and (f) of the new liquor law is vague. The definition states that persons are "related persons" if they do "exclusive principal or substantial business in the sale of brands purchased from a single brand owner." What is meant by exclusive principal or substantial business? Of the 330 wholesalers selling Seagram throughout the country, sixteen do 75 per cent or more of their business in the sale of our brands.

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Sixty-one do approximately 60 to 75 per cent in the sale of these brands; seventy-three do 40 to 60 per cent, seventy-nine, 20 to 40 per cent; sixty-four, 5 to 20 per cent; thirty-seven, 1 to 5 per cent. Where do we draw the line to define which of these wholesalers do a "substantial business" in the sale of our products and are therefore "related persons"? If the judgment in drawing the line between what is and what is not "substantial" is incorrect, the officer making the affirmation may be criminally prosecuted under the provisions of paragraph (j) of Section 9 of Chapter 531 for this error in judgment.

Even if it would be possible by some method to determine who are "related persons", there is not now and there could not be created sufficient machinery to determine with any reliability the price in a given month at which Seagram's brands are sold to wholesalers and retailers. Many states sanction a wide variety of discounts to be given to wholesalers and retailers which are not permitted in New York State. In states where different types of discounts are permissible, field supervisors must exercise both imagination and flexibility in meeting and responding to the competitive pressures which are so much a part of the liquor industry. In these states, Seagram's may grant to wholesalers depletion allowances which amount to deferred discounts, the amount of such discount not being determined until in some cases many months after the sale is made.

In some cases increased discounts are given to wholesalers whose sales of a brand in a given year exceed their sales of the same brand in the preceding year. Such a discount, under what we call an "escalator plan", is not determined until the year's end. Such deferred discounts pose a frustrating and impossible situation when we try to determine in any given month what is the price of one of our brands. The new liquor law in Section 9, para-

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graph (i) requires in determining what is the price of one of our brands in another state, that we include "all rebates, free goods, allowances and other inducements of any kind whatsoever". Certainly discounts in the form of depletion allowances or under the escalator plan would have to be included in computing the lowest price, yet it may be as long as a month or a year before we can determine what is the discount and therefore what is the price at which the brand was sold during the period in question. I have no idea how such discounts, however, could be allocated to sales in any specific month.

The impossibility of complying with this Act is even more sharply illustrated by the requirement that brand owners or wholesalers designated as agents must verify that the prices at which brands are sold in New York by wholesalers to retailers are no higher than the lowest price at which such brands were sold to retailers in other states by "related person" wholesalers in those states. Even if we could determine who these "related persons" are, we would have no power whatsoever to compel them to furnish us with any of their price information, for they are in all cases independent operatives under no legal compulsion to divulge their prices to manufacturer. If they did furnish us with such information, we would have no way of knowing whether the prices given by them were complete and accurate. If their discounts varied during the month, which is not uncommon, then they would have no way of telling us what the "price" was during the month.

The variety of "other inducements" employed by wholesalers in their sales to retailers is limitless. Discounts are sometimes given over a two to four week period but such period need not run within the calendar limits of a given month. What then is the price for that month?

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Wholesalers may also grant depletion allowances to retailers. Here again, assuming what will often be impossible, i. e., that we would be advised by the wholesalers of the discount, it is impossible to determine what is the wholesale to retail price in a given month. The State of California permits the granting of discounts on what is termed a "family plan" sale. Under such a plan, a wholesaler could offer a single package of a number of cases of various brands and grant a flat discount for the entire purchase. Although one could determine the discount in such cases, it is impossible to determine to what specific brands and in what ratio such a discount would be allocated.

Retailers would refuse to buy Seagram products if they were not supported by local and national advertising of brand names. Such advertising would appear to come within the definition of "other inducements" in the New York Act. It presents an impossible administrative task to break down these local and national advertising expenses, allocate them to specific sales to wholesalers and to specific sales to retailers, and further allocate such expenses to the price of a specific bottle or case of liquor sold in any given state at a specific time.

As I read the new liquor law, if for example Seagram's would run a magazine advertisement in a national magazine for Seagram's 7 Crown Whiskey, we would have to determine the effect of that advertisement on every community in the United States and allocate as an increment of price a portion of that advertisement to the sale of each bottle or a case of whiskey sold by each wholesaler and by each retailer throughout the country. That such a task is impossible is self-evident. That such an undertaking is commanded by the New York liquor law is equally self-evident.

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The only way in which we could approach compliance with the New York liquor law would be to eliminate even in states where they are permitted, all of these special discount practices and to impose throughout the country a single unvarying price for all Seagram brands sold to wholesalers and by independent wholesalers to retailers. Such a procedure, if possible at all, would certainly be violative of federal and state antitrust laws.

There is intense competition between distillers, large and small, for what each considers to be his fair share of the liquor market. It is this competition which requires distillers to employ the variety of discount practices discussed above. No distiller can survive without competing on this basis. The New York Act requires the elimination of these marketing practices and as a result a lessening of competition in states where such practices are permissible. This result would appear to run contrary to the policy behind the federal antitrust laws.

Paragraph 3(a) of Section 7 of the new New York liquor law requires that a schedule be filed in New York as to the price at which liquor is sold to a wholesaler, "irrespective of place of sale or delivery". This section would require that a price schedule be filed in New York for the sale of liquor which might be produced in Georgia and sold to a wholesaler in Florida—a sale which would have no conceivable connection with New York State. It is hard to believe that such was the intent of the drafters of paragraph 3(a); nevertheless, the filing of schedules as to such sales appears to be clearly commanded by that paragraph.

Liquor competes with wine for the customer's favor but for some unknown reason only distillers and wholesalers of liquor are singled out and subjected to the affirmation and verification burdens of the new law. Similarly, distilled spirit brands owned by a single New

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York retailer, so-called "private labels", are exempted from the price affirmation requirements of the new Act. Since our product line is in direct competition with these "private labels", I can see no reason why they are exempted from the burdens of the statute.

The problems created by compliance with the New York liquor law are so great that even if Seagram's should completely revamp its present marketing methods, and attempt to reorganize its administrative machinery, it will never be possible, even exerting its best efforts, for Seagram's to obtain sufficient information, with sufficient reliability, to make the affirmations and verifications required by the new New York liquor law. We are ensnared in a double-jawed trap. If we fail to make the affirmations, we may be prohibited from selling in New York.

If we make an affirmation, the affirming officer will subject himself to criminal prosecution if something in the affirmation is later shown to be inaccurate, and it is absolutely impossible to insure accuracy. Under the circumstances, no officer could safely sign such an affirmation.

Seagram's cannot, however, simply ignore the Act and if, as the regulations state, the filings under the Act will be required on the first of December, Seagram's must, at this very moment, establish machinery, however ineffectual, in an attempt to gather the required information. The establishment of such machinery would be extremely expensive. Our corporate organization and our entire sales organization would have to be overhauled, a monumental task, which has little chance for success.

Seagram's, therefore, requests that the enforcement of the Act be enjoined.

(Sworn to by Frederick J. Lind, October 20, 1964.)

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IN THE SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

AFFIDAVIT OF JOSEPH D. COTLER IN SUPPORT OF MOTION

State of New York,
County of New York, ss:

JOSEPH D. COTLER, being duly sworn, deposes and says:

That I am a Vice President of McKesson & Robbins, Incorporated. McKesson & Robbins is a Maryland corporation which is authorized to do business in New York. Its principal office is located at 155 East 44th Street, New York, N. Y. This affidavit is made in support of the motion for a temporary injunction and for a stay pending the hearing and determination of that motion.

The Company engages in the wholesaling and to some degree the manufacture of drugs and pharmaceutical products and in selling at wholesale a large variety of liquor, liqueurs, and wines.

In connection with its liquor sales, McKesson operates a liquor import division and sells these imported brands through its large national network of wholesale outlets. McKesson & Robbins does not distill or rectify liquor. Its liquor business consists of the distribution of domestic and imported brands throughout the United States. There are 46 McKesson & Robbins wholesale outlets throughout the country. In New York State McKesson & Robbins hold six wholesale licenses. A large portion of our liquor business is derived from sales in New York.

McKesson & Robbins has been designated as agent for a number of brand owners who are not licensed in New York. It also serves as agent for the foreign brands which it imports.

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Chapter 531 of the New York Session Laws, 1964, has amended the New York ABC Law in several significant respects. In Section 9 of Chapter 531, the State Legislature has imposed upon brand owners and their designated agents the requirement that in addition to the schedules to be filed for prices on all brands to be sold in New York, there must also be filed an affirmation verified by the brand owner or designated agent that the net bottle and case price both to wholesalers and to retailers is no higher than the lowest price at which the same items of liquor were sold, by the brand owner, designated agent, or some "related person" in any other state of the United States during the preceding calendar month.

All of our wholesale outlets are related to each other within the definition of "related person" in the new ABC Law. Before making any sales in New York therefore we must determine at what price each and every brand distributed in New York and distributed by us in some other state is being sold in other states. Paragraph (i) of Section 9 of the new ABC Law requires that in computing this price, reductions must be made to reflect "all discounts, rebates, free goods, allowances, and other inducements of any kind whatsoever." This language is so broad that it is impossible for us to determine what conduct might be considered an "inducement".

Each of our wholesale outlets has considerable autonomy. This is necessary to enable them to compete in their own local markets. Each local McKesson & Robbins wholesaler deals directly with distillers. The price which he pays distillers is not in any way controlled through the home offices of the Company. The prices at which McKesson & Robbins' wholesalers sell to retail is extremely flexible again being dependent upon local competitive conditions. Here again the home office exercises no control over the prices at which our wholesalers sell to retail.

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There are, however, a wide variety of discounts and allowances given. In Texas, Colorado and Minnesota, for example, McKesson wholesalers offer periodic discounts on certain brands. These discounts, often called "post offs" allow retailers to buy at a reduced price for a limited time after which the higher basic rate is reinstated. These discounts may be made available for a period which is not coterminous with the beginning and ending of any specific calendar month.

Even if McKesson & Robbins in its home office could compel our wholesalers scattered throughout the United States to furnish us with a complete list of their prices at all times, it would in fact be impossible for them to determine the price particularly in situations where discount programs extend from one month to the next or where local advertising is employed. It would be impossible for them to allocate advertising to the sale of a specific bottle or case of the brand advertised.

Some of our wholesalers also offered depletion allowances by the Import Division. Here again they would be unable to furnish us with their prices since these allowances offered are not computed until weeks and at times months after the sale is in fact made.

If, for instance, one of our wholesalers offers a quantity discount for a period of say April 16 to June 15 and the retailer purchases ten cases in April, ten in May and ten in June to make the quantity, is the discount translated into a reduction in price during the month of April, May or June? The language of the new New York ABC Law offers no solution for this problem yet if we file an affirmation in New York in which we fail to apply that allowance to what New York may consider the month in which it should be applied, the maker of the affirmation may be criminally prosecuted for making a "false statement" under the provisions of paragraph (j) of Section 9 of the new Law and sanction might be applied against us.

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There are a wide variety of other discount practices which are entirely legal in many states of the United States. At times so-called "free goods deals", point-of-sale promotions, and a wide variety of other allowances are offered through our wholesalers or our Import Division which may be considered "inducements" within the meaning of the New York law. We do not know how to convert such "inducements" into an adjustment in the price of a specific brand at any specific time.

McKesson & Robbins is in the peculiar position of having identifiable "related persons" throughout the country. As we read the new ABC Law, if any McKesson wholesaler in any state sells one single case of a brand of liquor which is also sold by a McKesson wholesaler in New York State the price at which that single case is sold must be taken into account in determining what is the "lowest price in any other state".

McKesson sells an extremely large variety of liquor to retailers in New York State. The mechanical problems which would develop if we compelled all McKesson wholesalers in all states to report the prices at which they are selling any of their brands would impose on McKesson's home office a monumental administrative task. The burden imposed upon McKesson may in fact be greater than that imposed upon any other wholesaler or for that matter any distiller, considering the fact that McKesson deals in so many lines in New York State.

In some instances, McKesson & Robbins acts as designated agents for unlicensed brand owners. In such situations the brand owner may be distributing his brands in other states through wholesalers other than McKesson & Robbins.

As I read the new ABC Law, we would be required to furnish affirmations and verifications only where McKesson & Robbins, or a "related person", sells the same brands in other states. We do not know in these cir-

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cumstances whether we would be considered "related persons" or not. An example of this problem is presented by the methods by which our company distributes the brands of the J. T. S. Brown Company, namely O'Shaughnessy Bourbon and James Walsh Blend. We sell these brands to retailers in the Syracuse and Utica areas. The brand is also handled by other distributors in other states. As designated agents, we are required to file the prices for these brands in New York State. We have no way of knowing what prices are being charged by other distributors in other states. Nor can we tell within the broad definition of a "related person" provided in the new ABC Law whether we or these other distributors in other states do "substantial business" in the sale of brands of the J. T. S. Brown Company and therefore satisfy the definition of "related person".

A similar problem occurs in our sales of Palo Viejo Rum. We import this rum from Destileria Tropical of Puerto Rico. We are designated agents for the sale of the brand in New York State although there are other distributors for this brand in New Jersey, Connecticut and possibly in other states. Whether we do sufficient business in the sale of this rum to qualify as "related persons" we do not know. Nor do we know whether these other distributors in other states would be deemed related persons within the vague definitions supplied by the new ABC Law. We certainly cannot obtain prices from these distributors in other states, yet should New York find that we are related to them and have failed to file the affirmations required by the Act, we may suffer the loss of our licenses in this State.

Should this Act become effective, we will be seriously injured in states which may be completely remote from New York State. As an example, if our wholesaler in Miami, Florida is faced with intense local competition, which competition would compel him to reduce his price

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on certain brands in order to maintain a share of the market, he must first consider the effect of that price reduction upon the New York market before making such reduction effective. And, if a reduced price in Miami would drive down the price at which the same brand could be sold in New York State, in the interests and well-being of our company as a whole, he would be reluctant to make such a reduction. This sacrifice might seriously impair his market position in Miami and may, in fact, drive him out of business. His local competition, however, is perplexed by no such problems. They would be free to regulate their own prices without fear of any extraterritorial effects which might result from their acts. The New York ABC Law may therefore seriously impair the normal operation of McKesson & Robbins wholesalers throughout the country.

We are afraid to sit idly by in the hope that the Court may declare unconstitutional the provisions of the new liquor law which we find impossible to comply with. Since the effective date of that law is the 31st of October, we must act now in preparing as best we can to satisfy its requirements. These preparations will completely disrupt our present method of doing business and will be quite costly as well.

For these reasons, therefore, we request that this Court temporarily enjoin the enforcement of Section 9 of the new ABC Law pending a determination as to its constitutionality. McKesson & Robbins request as well a stay pending the hearing and determination of the request for an injunction. If the stay and the injunction are not granted, McKesson & Robbins will suffer immediate and irreparable injury.

(Sworn to by Joseph D. Cotler, October 21, 1964.)

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IN THE SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

AFFIDAVIT OF RAYMOND REVIT IN SUPPORT OF MOTION

RAYMOND REVIT, being duly sworn, says:

I am the Executive Vice President of Hiram Walker Incorporated (Hiram Walker), the holder of New York wholesale liquor license LL-297 for its premises at 630 Fifth Avenue, New York 20, New York, and of New York wholesale liquor license LL-120 for its premises at 518 James Street, Syracuse, New York, and make this affidavit in support of the motion for the temporary injunction requested in the Order to Show Cause to which this affidavit is annexed and for the Stay pending the determination of such motion also requested in said Order to Show Cause.

I have been an employee and officer of Hiram Walker and its affiliated companies since 1941 and am familiar with the way in which Hiram Walker conducts its business.

Hiram Walker is the national sales company for the Hiram Walker brands produced by its parent company. These brands are sold by it to control states (i. e., states which themselves or through state agencies own and operate retail liquor stores) and to independent wholesalers throughout the United States.

The products thus sold by Hiram Walker in New York and throughout the United States consist of 40 brands in various sizes or 133 separate items and are distributed outside New York State by 105 independent wholesalers spread over twenty-nine states and the District of Columbia with places of business as far distant as Alaska and Hawaii.

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The owner of these brands is not licensed by the New York State Liquor Authority and has therefore designated Hiram Walker its agent to file the price schedules required by Section 101-b of the Alcoholic Beverage Control Law.

The recent amendments to Sec. 101-b.3 impose upon Hiram Walker unreasonable burdens and problems for which there are no solutions no matter what steps we may take in an attempt to comply with their requirements.

The thrust of these amendments is to require that the bottle and case prices listed in the schedules of prices to wholesalers filed by us each month and in the schedule of prices to retailers filed by us and/or our New York wholesalers each month for our 133 separate items of liquor shall be no higher than the bottle and case prices at which each such item was sold by us or by our 105 independent wholesalers during the immediately preceding month anywhere else in the United States and that we file by the 12th of each month a verified affirmation that the prices posted in such price schedules are such lowest prices under penalty in the event of a false statement of fine and imprisonment. The lowest prices to which the affirmation applies are not determined from the invoice prices, but must be reduced to reflect discounts in excess of those in effect in New York and all rebates, free goods, allowances and other inducements of any kind whatsoever offered or given to any purchaser. Adjustments may be made to reflect only differentials in gallonage taxes or fees and in the actual costs of delivery. (Sec. 101-b.3 [i].)

To comply with such requirements we would necessarily have to obtain at the end of each month a report from each of our 105 independent wholesalers of the prices at which he sold each of our 133 separate items during that month and a report of any discounts, re-

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bates, free goods, allowances and other inducements granted by him to each of his customers. It would be impossible for us to obtain such reports.

Each of our 105 wholesalers is independently owned and is not subject to the control or direction of Hiram Walker or of its affiliates. Each such wholesaler provides his own capital and directs the operation of his business. He is selected to distribute our products because of his ability to assume full responsibility for effectively and properly promoting the sale of Hiram Walker products in the territory serviced by him. We cannot require or compel such a wholesaler to provide us with the required information nor would he feel called upon to do so, even though such information may be required to enable us to comply with the laws of the State of New York. The wholesaler's position is that this is his business operated at his risk with his capital and for his account; that much of the information we require is confidential and we have no right to compel or expect its disclosure. He is not going to assume the cost or burden of analyzing his sales of each of our 133 items immediately after the close of each month and forthwith transmitting the required information to us.

The determination of the lowest price at which each of the 133 items is sold in any month outside New York State is further complicated by the requirement that appropriate reductions in the sale prices of such items be made to reflect allowances and other inducements of any kind whatsoever offered or given to any purchaser. Neither Sec. 101-b.3 (c) nor Rule 16 as amended provides criteria as to what are inducements required to be taken into account in determining lowest prices and as to how they are to be evaluated.

Does this vague and indefinite use of the term "inducement" include such usual and permissible activities as providing window displays, advertising materials,

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point of sale materials, the use of billboards and local newspapers to advertise the company's products? If so, must the amount used or provided in one state be compared with the amount used or provided in another, and how can the difference be evaluated to reflect an adjustment in price? This additional adjustment required to determine the lowest cost at which our products are sold outside New York State opens a Pandora's box of continual problems. Nevertheless we must verify an affirmation involving such considerations under penalty of fine or imprisonment and subject our licenses to possible suspension or revocation and our bonds to forfeiture.

We are also faced in this connection with the insoluble problem of the sales methods permitted in other states. In New York the maximum quantity discount allowed on sales to retailers is 2% while in other states graduated discounts on quantities up to 100 and more cases are permitted. How can such quantity discounts be properly evaluated in determining the lowest price at which each of our products was sold in another state? Another sales method permitted elsewhere is to offer a combination sale of five, ten or more cases of assorted brands and sizes at a discounted price, without allocating the discount to the respective items making up the combination. Here again we have no means of determining the reduction, if any, which may be required to arrive at the lowest price for each item making up the assortment.

It would appear that each of the 105 independent wholesalers who sell our brands in the normal course of business outside New York State is a "related person" for the reason that a principal or substantial portion of his business is likely to be the sale of a brand or brands of liquor purchased from us even though such wholesalers sell substantial quantities of the products of other suppliers.

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From time to time it becomes necessary or advisable to discontinue a wholesaler as a distributor of our products. In several states prior notice of such discontinuance (which may be as much as three months or more) must be given to the wholesaler. His interest in the company's brands understandably diminishes and in order to dispose of our brands to his best advantage he will sell them at reduced prices. We are then faced with the question as to when such a wholesaler ceases to be a "related person" and when, if ever, these cut-price sales no longer effect the bottle and case prices at which the same items must be sold in New York.

We have another situation where a wholesaler of our brands located outside this State finds himself in the midst of a price war and for personal reasons decides to maintain his competitive position. It must be remembered that this wholesaler sells other brands which are important to him and his interest is to protect his business. Such wholesaler in order to preserve his competitive position will offer our brands at substantially reduced prices without our knowledge. Nevertheless this independent decision made by an independent wholesaler to protect his business sets the maximum price at which thousands of cases of the same product can be sold in New York.

An even more serious situation can develop in the event of a dispute with an out-of-state wholesaler. This disgruntled wholesaler will necessarily be aware that the lowest prices at which he sells each of our products in his state to wholesalers and to retailers will fix the highest prices at which we can sell such products two months later in New York State. Thus if he threatens to make sales at reduced prices unless his demands are met, we have no alternative but to capitulate.

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As noted above, no adjustments in the lowest prices to be charged in New York are permitted to reflect those varying factors applicable to every enterprise engaged in the same business such as the cost of sales, advertising, warehousing and general overhead such as rent, and clerical and bookkeeping costs nor the differences in such costs which result from differences in volume, efficiency and business acumen. This means that the prices at which our most efficient wholesaler with the lowest operating costs sells our products, whether he be in Texas or Alaska or elsewhere in the United States, control the prices at which our New York wholesalers must sell our products, even if this necessarily requires them to do so at a loss and ultimately discontinue selling our products. Even in those instances of special legislation to meet the emergencies created by global war when price controls were temporarily introduced (which circumstance does not apply to this new legislation), provision was made to enable prices to be adjusted so as not to require that sales be made at below cost and to allow a reasonable profit and in those cases the criteria were the seller's own prices and costs and not those of others. To require otherwise is to take private property without due process of law and without just compensation.

Unless the stay and temporary injunction requested in the Order to Show Cause are granted, we will suffer irreparable injury, particularly if these amendments are ultimately determined to be unconstitutional.

We therefore respectfully request that the relief requested in the Order to Show Cause be granted.

(Sworn to by Raymond Revit, October 27, 1964.)

IN THE SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

AFFIDAVIT OF WALTER J. DEVLIN IN SUPPORT OF MOTION

State of New York,
County of New York, ss:

WALTER J. DEVLIN being duly sworn deposes and says:

1. I am Vice President of The Fleischmann Distilling Corporation, a corporation organized and existing under the laws of the State of New York with its principal office and place of business at 625 Madison Avenue, New York 22, New York.

2. I make this affidavit on behalf of The Fleischmann Distilling Corporation in support of an application for a preliminary injunction under Section 6311 CPLR.

3. As Vice President I am familiar with the marketing methods of the corporation.

4. The Fleischmann Distilling Corporation is a wholly owned subsidiary of Standard Brands Incorporated. It holds a Class A distillers license in New York State.

5. With the exception of sales to military installations, railroads, airlines and ships chandlers, all sales in New York are made to wholesalers. Fleischmann has no financial interest in any of its customers.

6. Fleischmann is engaged in the manufacture, distribution and sale of many types of distilled liquors. The best known of these products are Fleischmann's Preferred Blended Whiskey, Fleischmann's Bottled in Bond Kentucky Straight Bourbon, Fleischmann's Gin, and Fleischmann's Vodka. Fleischmann also imports and sells Black & White Scotch Whiskey. Most of Fleischmann's brands are sold in all states of the United States and the District of Columbia. A substantial amount of its business is derived from sales in New York.

7. Section 9 of Chapter 531 of the Laws of the State of New York, 1964 (effective October 31, 1964) amends the New York Alcoholic Beverage Control Law. Section 101-b,

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Subdivision 3, by adding thereto paragraphs (d) through (k). These new paragraphs lack clarity, require the impossible, and contain requirements which could be fulfilled only by violating the Federal anti-trust laws. If Fleischmann fails to meet the requirements of the new law, it could be denied the right to sell its products in New York.

8. Paragraph (d), added by Section 9 of the new law, would require Fleischmann to file, in conjunction with a schedule of prices to wholesalers in the State of New York, a verified affirmation that its prices to such wholesalers are no higher than the "lowest price" which it, or some "related person," has charged any wholesaler (or state agency in controlled states) in any part of the country at any time during the calendar month immediately preceding the month in which the schedule is filed. This apparently means that the prices contained in the New York price schedule for the month of January, 1965 which must be filed by December 1, 1964 (see Rules of the New York State Liquor Authority, Rule 16, Sections 65.2(f) and 65.7, as amended, effective October 31, 1964) must be no higher than the "lowest price" at which Fleischmann sold to any wholesaler in any part of the country during the month of November, 1964.

9. This means that Fleischmann may not promote a product by granting a temporary nationwide discount, unless it is willing and able to additionally grant the same discount on the same product in New York two months after the nationwide discount is offered. It is not certain, but it *may* be that the new law will permit Fleischmann to delay offering an otherwise nationwide discount in New York for two months (e. g., offer it in all states but New York in October and offer it in New York only in December), but this would disrupt any nationwide advertising campaign that might be conducted in conjunction with the special discount.

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10. Similarly, if a product is not selling satisfactorily in some other area of the country—it could be selling very well in New York—Fleischmann cannot, as it has in the past and might wish to do in the future, promote that product in that area by offering a special discount in that area, unless it is willing and able to offer the same discount in New York two months later. This would divert funds from the promotion of other products which might not be selling well in other areas of the country, including New York. Thus, promotional campaigns in other states may have to be drastically altered or abandoned because of the decrees of the State of New York.

11. In addition, paragraph (d) apparently provides that if costs require Fleischmann to raise its price on one of its products, it cannot do so in New York until two months after it has raised the price on that product in every other part of the country. This is not only unjust to purchasers in other states, but it could conceivably subject Fleischmann to charges of unlawful price discrimination. If another state should enact a similar law, Fleischmann would have to stop selling either in that other state or in New York State as it could not possibly comply with the laws of both states at the same time.

12. The requirements of paragraph (d) are made even more difficult by the definition of price in paragraph (i) as added by Section 9 of the new law. Paragraph (i) requires that "In determining the lowest price for which any item of liquor was sold in any other state (but apparently not New York State) * * * appropriate reductions shall be made to reflect all discounts in excess of those to be in effect under such schedule, and all rebates, free goods, allowances and other inducements of any kind whatsoever offered or given to any such wholesaler * * *". What is meant by "free goods" and "other inducements of any kind whatsoever" is not at all clear. These terms are so

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broad that they could include all forms of advertising including magazine, newspaper, billboard, and point-of-sale material of all kinds including novelties.

13. The type and amount of advertising done in any particular state varies according to the limits imposed thereupon by the different state laws and the particular market conditions. Magazine, newspaper and billboard advertising is always handled directly by Fleischmann. The statute does not clearly state whether such advertising should be considered when determining the "lowest price" that has been charged in other states. Nor does it indicate whether the cost of, say, a billboard advertisement located in an area primarily serviced by one distributor should be considered when determining what that distributor's "price" had been, or whether the cost of such advertisements should be attributed to the "price" in that state as a whole.

14. Similar problems exist in regard to point-of-sale advertising and novelties which, depending upon the size of the market and the number of Fleischmann representatives in the market as well as upon the various state laws, may or may not be given to wholesalers.

15. Even if Fleischmann knew which "free goods" and "other inducements of any kind whatsoever" should be considered when determining its past "prices" to wholesalers in different states, it would be impossible to determine those "prices" by the first of the following month when it must file its New York schedules or even by the twelfth of the month when it must file the required affirmation of "lowest price" (see Rules of the New York State Liquor Authority, Rule 16, Section 65.7(a) as amended).

16. Impossible as it may be to conform to the requirements of paragraph (d), it will be far more difficult to comply with paragraph (f) as added by Section 9 of the new law. Paragraph (f) apparently requires an affirma-

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tion on the part of Fleischmann that each of the prices contained in the schedules of prices filed by its New York wholesaler customers for sales to retailers are no higher than the "lowest price" charged by any of its wholesaler customers, who may satisfy the vague definition of "related person", anywhere in the United States during the month preceding the month in which the wholesalers' schedules are filed.

17. Fleischmann has no control over its wholesaler customers' prices to retailers and has no way of determining what "free goods" or "other inducements of any kind whatsoever" its wholesaler customers might have used to encourage retailers to buy from them. If Fleischmann sought to obtain such information from its wholesalers, they almost certainly would refuse to give it to us. If, however, they did supply such information, Fleischmann would have no way of checking the veracity of the information supplied and, therefore, could not make an affirmation that the prices which the wholesalers say they have charged are in fact the true "prices" including all "inducements". A false affirmation is subject to criminal sanction under paragraph (j) as added by Section 9 of the new law.

18. If Fleischmann were to dictate the prices all its wholesaler customers charged to their retailer customers and maintained a tight control upon the activities of all its wholesaler customers, it is conceivable that it would have sufficient information to enable it to file the affirmation required by paragraph (f). However, such activities on the part of Fleischmann would, without question, violate the Federal antitrust laws as well as the antitrust laws of many states, including New York.

19. Section 7 of Chapter 531 of the Laws of the State of New York, 1964, amends the New York Alcoholic Beverage Control Law, Section 101-b, Subdivision 3, paragraph (a) to require that the schedules to be filed under

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the new amendments must include the "net bottle and case price paid by the seller". Fleischmann Distilling Corporation manufactures and bottles liquor in New York and Illinois and *sells* it to wholesalers. It would be required to furnish this "net bottle and case price" even though it can have no "net bottle and case price" for the liquor it manufactures and bottles itself. It is completely impossible for Fleischmann to comply with this requirement. Rule 16 as amended, effective October 31, 1964 of the New York State Liquor Authority Rules in Section 65.6 apparently excuses Fleischmann and other manufacturers from complying with this section of the new law but the ABC law itself allows no such practical solution. If a "seller" fails to provide this impossible "net bottle and case price", he would nevertheless appear to be violating the new law if not the SLA regulations pertaining to it.

20. If relief from the burdens imposed by the new ABC law, which lacks clarity and requires the impossible, is not given, Fleischmann will be forced to choose between (a) only partially complying with the law and face possible criminal prosecution, or be denied the right to sell in New York, or both; or (b) making a futile attempt to comply with the law and risk being charged with violations of the Federal antitrust laws in addition to the possibility that it might face criminal prosecution in New York or be denied the right to sell in New York, or both; or (c) not selling its products in New York; or (d) not selling its products in any state other than New York.

Deponent, therefore, respectfully requests that this Court temporarily enjoin the enforcement of Section 9 of Chapter 531 of the Laws of the State of New York, 1964, and that part of Section 7 which requires us to furnish the "price paid by the seller" pending a declaration as to the constitutionality of those provisions.

(Sworn to by Walter J. Devlin, October 23, 1964.)

IN THE SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

AFFIDAVIT OF D. L. STREET IN SUPPORT OF MOTION

State of Kentucky,
County of Jefferson, ss:

D. L. STREET, being duly sworn, deposes and says:

I am Executive Vice President of Brown Forman Distillers Corporation, a Delaware corporation with its principal offices in Louisville, Kentucky. Brown Forman's principal business is done in the sale of Kentucky Bourbon Whiskey although other lines are handled as well. Our principal brands are Old Forester and Early Times Kentucky Bourbon Whiskey which we produce ourselves. We also carry Usher's Scotch Whiskey which we import, and the Bols line of domestic and imported liqueurs, gin and vodka.

Brown Forman holds a New York wholesale liquor license but does not sell directly to retailers in New York. It sells brands to nine independent wholesalers. Through these wholesalers Brown Forman sells in New York State approximately 65 different brands of liquor. During our last fiscal year, Brown Forman sold 68,861 cases of our brands in New York State.

I have been an officer of Brown Forman since 1947 and am intimately acquainted with Brown Forman's selling patterns and problems incident to the marketing of our product throughout the United States.

The recent amendment of New York's Alcoholic Beverage Control law, Chapter 531 of the Laws of 1964, Section 9(d), requires that brand owners or wholesalers designated as agents must file, in conjunction with schedules to be filed by them, an affirmation that the bottle and case price of liquor sold to wholesalers is no higher than the lowest price at which the same brand of liquor was sold by the brand owner, wholesaler designated as agent, or by a related person in any other state of the United States. Paragraph (f) of Section 9 requires a similar affirmation as to the wholesale-to-retail price.

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I do not understand what is meant by the term "related person". Both paragraphs (d) and (f) of Section 9 attempt to define this phrase but in their definition they include persons having "exclusive principal or substantial" business in the sale of brands from a single brand owner or wholesaler designated as agent. What is meant by substantial? I do not know. Some of our wholesalers do 30 per cent of their business in the sale of Brown Forman liquors. Is this substantial? The Act is impossibly vague on this point. Yet we are expected to somehow know who our "related persons" are and what is meant by "substantial business". Nevertheless as the Act provides, if we fail to sense what is intended by this vague definition, a person signing the affirmation may run the risk of criminal prosecution for his lack of clairvoyance.

Since it is absolutely impossible for us to determine what the New York Legislature intended in defining "related persons" as those doing "substantial business" in the brands of one brand owner, our only safe course is to assume that every wholesaler regardless of what percentage of his sales are derived from the sale of Brown Forman liquor, must be assumed to be a "related person". If, as it appears we must assume that every wholesaler who deals in our products is a "related person" then it would appear we would have to attempt to keep constant watch over these "related persons" throughout the United States, and the prices at which they sell our brands in order that an officer of the Company can affirm and verify that the prices which we file in New York are no higher than the lowest at which any of these "related persons" are selling.

We have no power to compel any wholesalers to furnish us with their prices and I am sure that not many of them would willingly do so. Moreover if they would be willing to give us such information in the time allowed under the statute, the problem of gathering it throughout the country would be in my opinion absolutely impossible. More-

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over the definition of price contained in the law likewise would make it impossible to obtain the information. Paragraph (i) of Section 9 of the new Act requires that appropriate reductions in price be made for "all rebates, free goods, allowances and other inducements of any kind whatsoever." If price is to include all "inducements" Brown Forman will be unable to determine within the short period of time required by the new Act what in fact is its price to wholesalers—not to mention the price at which the wholesaler sells to retailers. We certainly could not obtain our price to wholesalers within the single day which the State Liquor Authority by its recently amended rules will require. Nor could we obtain a computation of the lowest wholesale to retail price throughout the country within ten days after the end of the month during which those prices were in effect. State Liquor Authority Rule 16, Section 65.2, however, requires us to file affirmations within that period of time.

The impossible difficulty of our dilemma may be illustrated by some of our marketing practices in states other than New York. These marketing methods are completely legal in many states and are absolutely necessary if we are to hold our place in this highly competitive industry. It is customary for Brown Forman to grant depletion allowances from time to time, to wholesalers handling our brands. These depletion allowances, depending upon competitive circumstances will vary at different times and quite frequently will not be coterminous with the beginning or ending of any specific monthly period. Some depletion allowances are conditioned upon first selling a fixed quantity of a brand, and only after that quantity has been sold is the allowance granted. I assume such allowances are "inducements" within the new act and must also be included in determining price, yet it would be impossible for us, in some cases until months later, to determine what in fact was the price at which any given bottle or case of

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whiskey was sold to a wholesaler. Also, in states where such practices are legal we furnish our wholesalers with novelties or give-aways.

Depletion allowances encourage wholesalers to exert extra sales effort in selling our products to retailers, and novelties make the product more attractive to the retailer. All of these devices are operating expenses which must be borne if we are to make our product attractive to wholesalers, retailers and consumers. New York, in demanding that its wholesalers and retailers receive a price equivalent to the lowest price elsewhere and in including such inducements as described above, is in fact demanding that New York wholesalers receive an unearned discount. We do not get from our New York wholesalers services equivalent to those which we receive and for which we pay in the form of discounts, in our sales to non-New York wholesalers, yet we are required to furnish the New York wholesaler with a reduced price reflecting a discount which he has not in fact earned.

Competitive conditions vary widely from state to state. Our sales offices must be ready to respond instantaneously to an attack made on our market position in any given locality. Brown Forman sells to 17 so-called monopoly states at a single fixed price. These "monopoly states" are states in which the sale of liquor is controlled by a state agency. (It is only in our sales to the "monopoly states" that we do not engage in price competition as between sales in different states.) We sell to the "monopolies" at a price slightly lower, i. e., 25¢ to a dollar a case, than that at which we sell to the "open" states. This price difference is a result of reduced costs due to sales of large quantities to a single purchaser and the proportionally reduced sales staff needed for such states. We and other distillers have freely entered into contracts with these monopoly states in which we warrant that the f. o. b. prices at which our brands are offered to those states are

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no higher than the lowest price at which we sell in other states. These warranties, however, do not require us to consider brands, sizes or proofs which are not sold in the monopoly states. Some brands and sizes sold in New York are not sold to the monopolies.

Brown Forman at times conducts special local promotional campaigns. Such campaigns of necessity require local advertising. If we did not have such advertising, wholesalers within that area would refuse to handle our lines. How can such advertising be proportioned and related to the price of our whiskey? Where advertising reaches the monopoly states, it would have to be considered and proportioned—how I do not know—to our sales to those states as well.

I am certain that wholesalers selling our products make special discount arrangements with the retailers. What these arrangements are I do not know. We have no control over such wholesalers and no way of obtaining such information from them. In no state is there presently a requirement to relay back to a brand owner what a wholesaler's price to retail happens to be. Many states of course have price postings yet even here all discount arrangements need not be reflected. In the States of Florida, Louisiana and Texas for instance there is no posting and no control whatsoever over price. We do not and cannot know what is the wholesale or retail price in such states.

Our affirmations however cannot ignore the price at which our brands are sold in the states. Since we can not obtain this information, we will be unable to make the affirmations required, and therefore may be excluded from the New York market. This will severely injure our business, yet it appears to be the commanded result of the new New York liquor amendments. The only alternative would be to have one of our officers make the affirmation in the hope that it has accounted for all

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prices elsewhere and is therefore correct. If however it is subsequently determined that a sale was made somewhere at a price lower than that posted in New York, the affirmation would be false and the officer signing it subject to penal sanctions. It is unfair to ask our company to run these risks particularly where there is a possibility that the new Act may be declared unconstitutional.

There is only one way in which we can be sure of obtaining the sufficient price information so as to be able to comply with the new Act. Brown Forman would have to establish a "flat price" for all Brown Forman's brands throughout the United States and issue orders that under no circumstances could such "flat price" be varied. This would require also the establishment of elaborate policing machinery to ensure compliance. The establishment of such a "flat price" would appear to be a direct violation of federal antitrust laws. Nevertheless New York apparently intended its act to have precisely such extraterritorial effect.

In Section 7 of the new New York Liquor Law, the New York Legislature states that it is part of its purpose in establishing such law to eliminate "the practice of manufacturers and wholesalers in granting discounts, rebates, allowances, free goods, or inducements to selected licensees." The New York Act however would appear to compel us to eliminate the granting of inducements not only to New York wholesalers but to those in every other state of the country as well. The New York Act will have an additional extraterritorial effect in placing distillers such as Brown Forman at a distinct competitive disadvantage when competing with brands which are not sold in New York. If for instance Early Times which is sold in both New York and Montana is competing with a local bourbon which is not sold in New York and for some local competitive reason the price

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of the local bourbon is reduced, Brown Forman could not dare to reduce the price of Early Times to meet that competition since it would be required to reduce its Early Times price in New York State by the same amount in the following month.

The way in which the new New York liquor law will serve to destroy Brown Forman's business can also be illustrated by another example. The warranties required by the "monopoly states" require that the price at the exact time of sale, or at the time of sale and for a 30-day period thereafter, be no higher than the lowest price at which other purchasers, at the same time, are paying for the same goods. By contrast, the New York liquor law will now require not a warranty as to the price "*at the time of the sale*" but an affirmation that the price at which New York wholesalers and retailers purchase the goods in any given month is no higher than the lowest price at which wholesalers or retailers *during-the preceding month* paid for the same product in states other than New York. This distinction which may on its face seem insignificant, will prevent Brown Forman and all other distillers similarly situated from at any future time increasing the price in New York or in the 17 "monopoly states" of any of their brands which happen to be sold in both New York, and the "monopoly states".

This dilemma may be illustrated by the following example. If during the month of January, the f. o. b. price of Old Forester in both the "monopoly states" and New York is \$45 per case, and for some justifiable reason Brown Forman intends to increase that price during the month of February to \$50 per case in both the monopoly states and New York, it could not do so since although such an increase would be permissible in the monopoly states, New York, in the month of February, would demand the lowest price in the preceding month.

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i. e., \$45 given in other states. If New York pays a price of \$45 during the month of February while the monopoly states pay the \$50 price, such price in New York would be a violation of the warranties given to the monopoly states. They would therefore demand that they also during the month of February receive a price of \$45 per case. We would therefore become hopelessly ensnared by this inescapable action and reaction and chained to a permanent rigid price. These are but some of the far-reaching consequences of New York's recent liquor amendments. I stress again the complete impossibility of our being able to determine who are "related persons", and secondly, being able to determine what is our price, including "other inducements", in our sales to wholesalers and wholesalers' sales of our brands to retailers. We will be irreparably injured if we are not saved from this impossible morass by this Court's enjoining the enforcement of this law before it becomes effective and before we are compelled to do that which we are incapable of doing.

To prevent the irreparable injury to our business which would immediately occur during the pendency of this litigation, it is respectfully requested that the temporary injunction prayed for in the complaint be granted. For the same reason, it is also respectfully requested that, pending the hearing and determination of the motion for a temporary injunction, an appropriate stay be granted restraining the enforcement of the objectionable features of the new law.

(Sworn to by D. L. Street, October 20, 1964.)

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IN THE SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

AFFIDAVIT OF R. R. HERRMANN, JR., IN SUPPORT OF MOTION

State of California,
County of Los Angeles, ss:

R. R. HERRMANN, Jr., being duly sworn, deposes and says:

I am Vice President of National Distillers and Chemical Corporation, a Virginia corporation duly qualified to do business in New York and having its principal place of business at 99 Park Avenue, New York, New York, 10016. I am also Assistant General Manager at National Distillers Products Company, the Liquor Division of National Distillers and Chemical Corporation. I am well acquainted with the methods by which National Distillers and Chemical Corporation markets its liquor products throughout the United States.

National Distillers and Chemical Corporation is engaged principally in the liquor and chemical businesses. Its liquor business is conducted in all states of the United States with the exception of Mississippi. Our brands are sold as well in the District of Columbia, United States territorial possessions, and throughout the principal countries of the world. The principal brands sold by the company in the United States market are Old Grand-Dad, Old Taylor, Old Crow, Old Sunny Brook, Hill & Hill, Bond and Lillard and Bellow's American Whiskies, Vat 69 Scotch Whiskey, and Gilbey's Gin and Vodka.

Our company markets its brands through approximately 230 wholesale liquor dealers in the so-called "open" states and to 17 so-called "control" states. Except for sales by our division, Peel Richards, which sells to retailers in the Metropolitan New York area only, National Distillers and Chemical Corporation does not sell directly to retailers.

Most of our brands are sold in New York, although we have some brands, such as Old Sunny Brook, which are not offered to the New York market.

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National Distillers and Chemical Corporation holds a New York wholesale liquor license. Sales to wholesalers in New York are made through two of its divisions, the National Distillers Products Company for domestic brands, and the Munson G. Shaw Co. for imported brands.

The New York market accounts for a substantial part of the company's liquor sales.

Our sales headquarters are at 99 Park Avenue, New York, New York, 10016. Our sales organization covering the open states is divided into four principal regions, namely, the Eastern, Central, Southern and Western. These regions are divided into divisions under the control of division managers. These divisions generally consist of blocks of three or four states. The division managers report to their regional supervisors who, in turn, report to me.

Sales to the "control" states are conducted through a separate division and are supervised by a vice president in charge of such sales, whose headquarters is at 99 Park Avenue, New York, New York.

Orders from wholesalers throughout the country are sent to our New York headquarters for acceptance and approval as to credit. After acceptance, the orders are then sent to our distilleries located in Kentucky and Ohio for shipment.

Chapter 531 of the Laws of New York (1964) significantly amends Section 101-b of the Alcoholic Beverage Control Law. The principal change is found in Section 9 of the new Act, which amends subdivision 3 of Section 101-b of the Alcoholic Beverage Control Law by adding eight new paragraphs. Paragraphs (d) and (f) of Section 9 require that in connection with the schedules to be filed by brand owners or wholesalers designated as agents setting forth the distiller-to-wholesaler price, and in connection with the schedules filed by wholesalers as to wholesaler-to-retailer price, there must be submitted an

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affirmation verified by the brand owner or wholesaler designated as agent that the bottle and case price of liquor sold to wholesalers and the bottle and case price of liquor sold to retailers is no higher than the lowest price at which the same item of liquor is sold anywhere else in the United States. These required affirmations are a new and radical change in New York's price-filing requirements.

It will be impossible for National Distillers to furnish these affirmations.

There is intense competition between companies and brands in the liquor industry. This competition dictates the prices at which our company's brands are sold in various localities. Prices are set at levels which will make them as desirable to the purchasing public as comparable brands of any of our competitors. Generally speaking, however, our case prices to wholesalers in the "open" states and in the District of Columbia are uniform f. o. b. distillery prices. Prices to the Control (Monopoly) States are slightly lower, these states being a different and distinct class of purchasers.

Within each state, and sometimes within markets within a single state, there is a variety of factors which dictates different prices for our brands in each of these markets. Seasonal variations in demand and geographical differences in taste are significant factors in dictating the prices in local markets. In order to meet these local competitive pressures National Distillers offers, where such practices are permissible, a wide variety of discounts and allowances. Local conditions must be met on a regional or divisional level and for this reason regional supervisors and divisional managers are given considerable freedom in the methods they wish to employ in supporting the market position of our brands in their own local markets. Some of these allowances take the form of a flat discount for a quantity purchased or

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an allowance per case for each case sold. Others take the form of depletion allowances which are determined and paid to a wholesaler only after he has sold the goods. Some of our salesmen offer window-display material, counter-display material and consumer novelties. This sort of inducement is termed point-of-sale promotion. It is offered to wholesalers with the hope that our brands will be made more attractive to the retailer and the consumer and thus assist the wholesaler in selling our brands. All of these discounts are intended to, and in fact do, purchase for National Distillers additional sales effort on the part of the wholesalers.

Periodically, accounting is made to the New York headquarters for expenditures for these discounts and allowances and for local advertising costs. Only after these expenditures have been determined and apportioned to case goods sold in a particular market for a specific period of time can our company be in a position to determine what the net bottle and case price for any of our brands would have been for that brand in that specific locality. This would, however, only be an average figure and not valid as to a specific calendar month. Compiling these expenditures may itself take many months.

Another condition in the liquor industry which may dictate a difference in price between two geographical areas is exemplified by problems incident to National's sales of Bellow's Club Whiskey, a brand sold throughout the United States. In the State of Texas, Bellow's Club is sold for a price which is less than that at which it is sold in most other states due to the fact that the brand name is unknown in Texas. In New York, Brand A is a Class "A" brand but in Teaxs it is a Class "B" brand. Since the brand is unknown in Texas it is necessary for National to sell it as a "B" at a lower price in order to make the brand competitive. The State of Texas imposes no restraints whatsoever upon the allow-

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ances or other inducements which are offered to wholesalers to make the brand competitive.

In addition to local sales promotions and sales aids, the company, through its headquarters in New York, formulates and schedules national newspaper and magazine advertising. The extent of this advertising in any market depends upon the extent of our company's brand sales in the market and the need to acquire or maintain a strong sales position. This advertising is paid for from our national advertising budget and may be distinguished from local advertising conducted in specific regions, the cost of which is allocated to the regional expense budget. There is not now, nor could there be established, a breakdown of national advertising which could apportion such expenses to local markets.

Returning again to the new New York Liquor Law, it can be seen that it poses for us insurmountable problems in the light of our marketing methods discussed above.

The new New York Liquor Law requires that, in computing what is the "lowest price" at which our brands are sold in any other state, we make appropriate reductions to reflect all discounts, rebates, free goods, allowances, and other inducements of any kind whatsoever. Presumably all of the discounts, allowances, and advertising discussed above must be taken into account in determining what is the "lowest price".

National Distillers cannot determine at any given time exactly what is the net bottle and case price of one of its brands. What are "inducements of any kind whatsoever"? Presumably, "inducements" would include any assistance offered a wholesaler or retailer, however indirect or slight such assistance might be. The problem is particularly acute in the impossibility of allocating advertising costs to specific case goods, and the impossibility of allocating depletion allowances to goods at a specific period of time.

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Many local promotional campaigns are not specifically timed to coincide with a calendar month. In such situations, where a promotion would extend from the middle of one month to the middle of the next, would advertising in conjunction with that promotion be allocated to sales in the first or second month?

New York, in its new Liquor Law, is attempting to secure from us benefits in the form of lower prices even though, unlike wholesalers and retailers in other states, New York wholesalers and retailers would not be required to expend special sales effort in behalf of our brands.

The very nature of our company's business illustrates that compliance with the affirmation and verification provisions of the new New York Liquor Law is impossible. In an attempt to comply with the new New York Liquor Law, we would have to completely reorganize our selling methods and eliminate entirely legitimate selling practices in other states. This would be necessary in order to simplify information gathering procedures in our efforts to determine what in fact is the "lowest price" at which a brand is sold to wholesalers or retailers during a specific calendar month in states other than New York. Regardless of what machinery we might establish, however, we nevertheless could not maintain sufficient control over all sales to determine prices with sufficient certainty so as to make the affirmations.

The requirement that we take into account "inducements of any kind whatsoever" in determining the lowest price is so broad that we have no way of knowing what indirect or incidental acts by any of our salesmen might be construed as inducement and, as pointed out above, even where such conduct might be labeled as an "inducement," it is impossible for us to translate this into an increment of price.

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In paragraph (f) of Section 9 of the new Liquor Law affirmations and verifications are required as to the wholesaler-to-retailer price. The Act does not, however, state who in fact is required to furnish these affirmations. The State Liquor Authority regulations, Rule 16, §65.07, states that the affirmations as to the wholesaler-to-retailer price must be made by the brand owner or wholesaler designated as agent. If this is the case, an even more impossible task is presented in affirming the wholesaler-to-retailer price than in affirming the distiller-to-wholesaler price. We have absolutely no way of determining what discount arrangements are established between wholesalers and retailers. Nor do we know what retailers might be considered "related persons" as that term is defined in paragraph (f). Wholesalers do not now report to us their prices to retailers. Nor can we compel them to do so.

By dictating a fixed schedule of prices to wholesalers and prices to retailers throughout the country and by establishing sufficient machinery to police those prices, sufficient control might be maintained so as to enable us to make the affirmations required by the new New York Liquor Law. I fear, however, that should we engage in such price control practices, we would certainly be violating federal antitrust laws. The only possible way in which we can comply with the new Liquor Law will expose us to even more severe penalties, if compliance violates federal antitrust statutes, than those already provided in the New York Act.

As a manufacturer of liquor we are confronted with another impossible burden if we are to comply with the requirements of paragraph 3(a) of Section 7 of the new Liquor Law. That section requires that schedules of prices to the wholesalers must include the net bottle and case price "paid by the seller." National Distillers and Chemical Corporation, through its division, National

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Distillers Products Company, most certainly is the seller, but as manufacturers, we have no net bottle and case price and therefore it is completely impossible for us to furnish such a price in our schedules.

The new New York Liquor Law by its very terms is so vague and ambiguous that it is impossible for us to understand the meaning of some of its sections and therefore impossible for us to comply with the requirements of those sections. One of the most difficult problems is that presented by the definition of "related persons" found in paragraphs (d) and (f) of Section 9 of the new Liquor Law.

In determining for purposes of the affirmations and verifications, what is the lowest price in any other state, our company is required to consider only those sales made by ourselves as either brand owner or designated agent, or by a "related person." "Related person" is defined as

"any person (1) in the business of which such brand owner or wholesaler designated as agent has an interest, direct or indirect, by stock or other security ownership, as lender or lienor, or by interlocking directors or officers, or (2) the exclusive, principal or substantial business of which is the sale of a brand or brands of liquor purchased from such brand owner or wholesaler designated as agent, or (3) who has an exclusive franchise or contract to sell such brand or brands."

We do not understand who satisfies the second definition offered for the term "related person." What is meant by the words "substantial business"? The statute is impossibly vague on this point.

If we are required to make such a determination and if we fail to include one wholesaler who in our opinion

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is not a "related person," and it is later determined that that wholesaler is selling at prices lower than those posted in New York and for some reason is considered by the State Liquor Authority to be a "related person," the person making the affirmation will subject himself to the penal provisions of the new Liquor Law. The company may, in addition, lose its license as provided in Section 10 of the new Liquor Law. This is a severe penalty which may be imposed upon us even though the company makes every possible effort to comply with the statute.

It will be impossible to satisfy the demands of the new Liquor Law. In addition, preparations to comply with it will involve considerable expense to our company and will dictate a complete reorganization of our selling divisions.

To force National Distillers and Chemical Corporation to attempt to comply with the new Liquor Law where that law may be declared unconstitutional and where we will suffer immediate and irreparable injury by the enforcement of that law, would be an unfair and unnecessary burden to impose upon us.

We therefore respectfully request that this Court temporarily enjoin the enforcement of the new Liquor Law pending a declaration as to the constitutionality of that law. National Distillers and Chemical Corporation also respectfully requests that the Court grant a temporary restraining order pending the hearing and determination of the injunctive action.

(Sworn to by R. R. Herrmann, Jr., October 20, 1964.)

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IN THE SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

AFFIDAVIT OF IRA R. SCHATTMAN, JR., IN SUPPORT OF MOTION
State of New York,
County of Queens,

IRA R. SCHATTMAN, Jr., being duly sworn, deposes and says:

That he is Secretary of Standard Food Products Corporation, a New York State Corporation, with offices at 45-11 33rd Street, Long Island City, New York.

The said corporation (hereinafter called "Standard") sells a large variety of distilled spirits and wines to retailers in the Metropolitan New York area.

Standard has 41 suppliers of distilled spirits, domestic and imported. Over 50% of our business, on the basis of total sales, is done with one of our suppliers, in the sale of brands manufactured and/or owned by such supplier, approximately 7% in the sale of brands of another supplier, approximately 6% in the sale of still another supplier. There is a range from less than 1% to 7% in the sale of the brands of various suppliers.

Standard's suppliers are domestic distillers, importers of distilled spirits produced abroad, and primary distributors or agents of suppliers not licensed in this State.

The new New York Liquor Law (Chapter 531 of the Laws of 1964) in Section 9, paragraph (f), requires that in conjunction with the schedules filed by wholesalers in New York State as to their prices to retailers, there must also be filed an affirmation that the bottle and case prices appearing in such schedules are no higher than the lowest prices at which a brandowner, wholesaler designated as agent or "related person" sells the same items to any retailer anywhere else in the United States.

Paragraph (g) of Section 9 requires an affirmation by the person filing the schedule that he does not sell to retailers in any other state at prices lower than those offered in New York.

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I do not understand what will be required of Standard in order to satisfy the requirements of paragraphs (f) and (g) of the new Liquor Law.

Paragraph (f) requires the filing of the aforementioned affirmation, but does not state precisely who is responsible for its preparation and submission. The recently amended Rule 16 of the State Liquor Authority Rules and Regulations, attempts to clarify this problem by delegating to the brandowner or wholesaler designated as agent the responsibility for filing the affirmation required by (f). If the State Liquor Authority interpretation is correct, Standard, if it is a "related person," need not file under paragraph (f), yet cannot sell until the brandowner or wholesaler designated as agent has filed. If Standard however is not a "related person," it would file its own affirmation under paragraph (g) and would be free to sell to retailers, provided it does not sell outside of New York State, at any price it chooses regardless of the price at which the same brand may be sold in some other state. Standard must therefore decide whether it is a "related person" placing it under the purview of (f) or not a "related person" and therefore subject to the directions of paragraph (g). The new New York Liquor Law, however fails to define "related person" with sufficient clarity to enable us to make this determination.

Paragraph (f) includes in its definition of "related person," those doing "substantial business" in the sale of a brand or brands of a single brandowner. What is "substantial business"? By doing over 50 per cent of our business in the sale of brands from one supplier, is Standard related to them? Is Standard related to another supplier since it does approximately 7 per cent of its business in the sale of their brands? What is

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the cut-off point? Standard cannot answer these questions and therefore cannot tell whether it is or is not a "related person."

Rule 16 of the State Liquor Authority regulations, in Section 65.7(e) requires, in an affirmation filed under paragraph (g), that the person filing the affirmation must include a representation that he is not a "related person." If Standard improperly classifies itself as "not a related person," and files an affirmation under paragraph (g), it may be criminally prosecuted if the classification is incorrect.

Standard may in fact be a "related person" as to some suppliers but not related as to others. If Standard is considered a "related person," the price at which it sells in New York would be controlled by a maximum price ceiling established by the price at which some complete stranger is selling in another state. Standard could not sell at all in New York if for some reason the brandowner or agent, over whom Standard has no control, failed to file the required affirmations. If, however, Standard is not a "related person," it would be free to set its own price.

It is impossible for Standard under the vague guidelines provided by the new liquor law to determine whether or not it is a "related person." This determination will significantly affect our method of doing business in New York. An erroneous determination on our part may subject us to penal sanctions. For these reasons, we respectfully request that the motion for a temporary injunction be granted.

(Sworn to by Ira R. Schattman, Jr., October 22, 1964.)

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IN THE SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

AFFIDAVIT OF FRANK T. HYPPS IN SUPPORT OF MOTION

State of New York,
County of New York, ss:

FRANK T. HYPPS, being duly sworn, deposes and says:

1. I reside at 40 West 63rd Street, New York, New York 10023. I am a marketing and management consultant and serve as an organizer and director of marketing-management programs for the identification and solution of marketing and economic problems related to the sales volume and profit progress of client companies.
2. I received a B.S. degree in Economics and Marketing, Wharton School of Finance and Commerce, University of Pennsylvania, 1925; A.M. 1927; Ph.D. 1929.
3. I am the author of:

"Desk Top Reference," Comparative Market Facts (Consumption, Wholesalers, Retailers, Consumers, Distillers), Distilled Spirits Industry, A. Asch, Inc., N. Y., N. Y., 1958.

"Combination Thinking for Progress Urged," Twenty-Sixth Annual Wine and Spirits Number, The Journal of Commerce, N. Y., November 20, 1958.

"How Markets Will Be Made in 1954," Louisville Advertising Club, Magazine, Louisville, Kentucky, 12/4/53.

"Analyzing the Dynamics of Local Markets," American Marketing Association, Workshop, N. Y., N. Y. 11/3/52.

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"Market Survey—an Economic Telescope Designed to Bring Management Closer to Markets,"
The Seagram Spotlight, N. Y., N. Y., 4/1/48.

4. From 1925-1937 I was an Assistant Professor of Marketing and Merchandising, Wharton School of Finance and Commerce, University of Pennsylvania, Philadelphia, Pennsylvania. Courses taught in undergraduate and graduate schools included Marketing, Economics, Advertising.

5. From 1938 to 1946 I served as a Marketing Expert, Department of Revenue, Commonwealth of Pennsylvania, Harrisburg, Pennsylvania; Marketing Analyst, Radio Corporation of America, Inc., Camden, New Jersey; Director of Marketing, Brown and Tarcher, Inc. (Advertising), New York, New York; Vice President, Norris and Elliott, Inc., New York, New York (consultants); Director of Marketing Research, Member of Management Committee, Schenley Distillers Corp., New York, New York.

6. From 1946 to 1958 I was consultant and director of A. Asch Incorporated, New York, New York (Advertising), division of Distillers Corporation Seagram, Ltd., New York, New York.

7. I organized and directed, as a division of the Asch organization, a continuous marketing research program in support of the marketing operations of the various sales divisions of Distillers Corporation Seagram, Ltd.

These embraced Browne-Vintners Co., Calvert Distillers Corp., Carstairs Bros. Distilling Co., Inc., Frankfort Distillers Corp., Seagram Distillers Corp. My duties included an analysis of economic and competitive forces working for or against the sales program of the companies' various brands.

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8. Since 1958, I have been president of the Coordinated Marketing-Management Corporation, New York, New York, an independent marketing analysis firm, and I currently am the director of marketing management surveys and installations for client companies.

9. From 1937 to date I have had an intimate knowledge of the industry and have been thoroughly conversant in its pricing, marketing and sales practices.

I. Conclusion

1. Based upon my aforesaid intimate knowledge of and experience in the distilling industry since 1937, its products, markets, and competitive situation, it is my conclusion that competition within the industry at both the manufacturing and primary distributing levels is now and should continue to remain for the foreseeable future of such a vigorous quality as to allow natural market forces alone to prevent anti-competitive price discrimination in distilled spirits in New York after the repeal of Section 101-c of the Alcoholic Beverage Control Law.

2. My studies of the competitive problems of the industry from coast to coast which embrace 320 test cities do not reveal market factors within the industry either at the manufacturing or primary distribution level that could lead to a reasonable concern that this industry, more than any other line of business enterprise, will be able to resort to "monopolistic and anti-competitive practices" in an effort to thwart the effects of the repeal of section 101-c.

3. In the preparation of this affidavit I have read and analyzed Sections 8 and 9 of the New York Session Laws, 1964, Ch. 531. I understand section 9 generally prohibits manufacturers and wholesalers of distilled spirits from

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selling liquor in New York in the next succeeding month at a price higher than the lowest price at which the same brand was sold elsewhere in the United States during the immediately preceding month.

4. I understand section 8 states a desire that fundamental principles of price competition should prevail within the industry and that consumers in New York should not pay unjustifiably higher prices for liquor than consumers in other states. To this end the repeal of Section 101-e of the Alcoholic Beverage Control Law is effected. I further understand section 8 to question whether industry members might not in the future attempt to thwart the effect of repeal of section 101-e by engaging in "monopolistic and anti-competitive practices." It is my understanding that section 8 finds the maximum price provisions of section 9 to be necessary "to forestall" such practices.

5. I have analyzed the five study papers of the Moreland Commission to Study the Alcoholic Beverage Control Law. In none of these studies is any definitive analysis made or data presented relative to the distribution costs of distillers or wholesalers by product lines sold, or the markets they service—by states or areas within a state—that could be considered a standard of reference for imposing maximum prices on distiller sales to wholesalers or wholesaler sales to retailers as enacted in the law.

6. The repeal of section 101-e will generally serve to place the distribution of liquor within a free market and pricing context. Given this situation, there is no justification from the economic standpoint for placing maximum price restrictions in the form of the lowest price charged elsewhere upon manufacturers and primary distributors of distilled spirits. Furthermore it is

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my opinion there is not a present or reasonably foreseeable danger that the industry structure is or will be so constituted as to engender anti-competitive conditions which would serve to nullify the desire of section 8 that "fundamental principles of price competition" should prevail within the industry. These conclusions are the result of the following discussion.

II. *Discussion*

1. Since the end of World War II radical shifts have taken place in consumer demand and acceptance of various types of distilled spirits, indicating the intense competition between distillers who seek to win the public's acceptance of particular types of whisky. These changes have drastically affected the market position held by individual distillers relative to the type or types of whiskey they feature in their marketing efforts.
2. Illustrative of these changes is the situation in New York State, which currently accounts for 12 per cent of national consumption. In 1954 spirit blends accounted for 52.3% of New York consumption. This fell to but 37.9% in 1963. The importation of Scotch whisky, which amounted to 11.6% of consumption in 1954, rose to 17.3% in 1963. Vodka, which amounted to but 1.2% of the market in 1954, rose to 5.9% in 1963. Bonded whisky, on the other hand, which accounted for 4.6% of the market in 1954, fell to but 1.5% in 1963. Importers and distributors of Scotch whiskies in New York have shown in the last ten years the greatest increase in the gallonage consumption of liquor over any other type of whisky sold in the New York market.
3. Other changes in the consumption pattern in New York are shown in the chart attached as Appendix A.

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4. Incident to these major changes in consumer demand and acceptance of various generic types of liquors have been the related changes in the market position of the various brands sold by suppliers. For example, a comparison of 1954 and 1963 sales figures of items among the seventy leading brands shows the following shifts in preference:

Cases (thousands)				Product Type
1954	—	1963	Brand Name	Marketer
7,250	—	7,350	Seagrams' 7 Crown	Seagrams
1,250	—	2,325	Old Crow	National
2,725	—	2,225	Imperial	Hiram Walker
655	—	1,525	Ancient Age	Schenley
715	—	1,925	Jim Beam	James B. Beam
1,250	—	1,475	Early Times	Brown-Forman
825	—	1,300	Fleischmann's Pfd.	Fleischmann
60	—	1,125	J & B	Paddington
N.A.	—	1,300	Cutty Sark	Buckingham
2,950	—	1,800	Calvert Reserve	Seagrams

(Source: Business Week, McGraw Hill Publishing Co., N. Y., N. Y. Issue: 1/9/54, 2/22/64. For other examples see Appendix B.) Indicated in this comparative analysis is the continuing competitive nature of the industry as gauged by the types of product sold, the entry of new competitors and the rivalry between small and large distillers. This is the opposite of any monopolistic condition.

5. Also to be considered in any discussion of competitive marketing influences is the so-called private label

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brand, which in New York is a brand of liquor that is solely owned by one retailer. These brands are in direct competition with nationally marketed brands. Currently, they account for 12% of the sales of New York retailers who feature such private brands. (Source: Marketing Research Division, A. Asch Co., February 3, 1964.)

6. Not only is competition found among the various types and brands of liquor; the industry is also subject to competition from the beer and wine industries. The 15 distilling companies analyzed by the First National City Bank, N. Y. according to their "net income after taxes to net assets" (Appendix C) had total sales, including excise taxes, of \$3.316 millions or only 31 per cent of consumer spending on all alcoholic beverages in 1962, which amounted to \$10,665 millions. (Source: Monthly Economic Letter, First National City Bank, N. Y., N. Y., June 1964, p. 69.)

7. Today it is generally recognized that in any industry 60 per cent of the forces working for or against the profitable progress of a business is beyond management control because of varying economic, social, political and psychological factors. In the distilling industry, these outside forces are compounded by extensive state and federal taxation and restrictive operating regulations. On the average in 1963 federal and state taxes ranged from 45.8 per cent of the retail price of a fifth of whiskey (Colorado) to 61.3 per cent (Kentucky). In New York State it is 50.7 per cent. (Source: Tax Council of the Alcoholic Beverage Industry, N. Y., N. Y., 1964.) The result is that such outside forces dominate 85 per cent of the industry's ability to meet the multi-faceted demands imposed upon it by the free market.

8. It is the considered opinion of many who have studied the industry that the combined effect of the increasing regulatory and tax burdens on the industry is creating a con-

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dition akin to economic as opposed to legislative prohibition. The condition is evidenced by the continual decline of the industry's share of the consumer's spendable income. Distilled spirits expenditures as a per cent of disposable income after federal and state taxes accounted for 1.4 per cent of such expenditures in 1939, but by 1962 they had fallen to 0.6 per cent of such expenditures (U. S. Department of Commerce, Survey of Current Business, 1939-1962).

9. With regard to profits for the past ten years (1954-1964) the distilling industry has fallen below the rate of "net income after taxes to net assets" compared with the average of leading manufacturing corporations.

Net Income after Taxes Versus
Net Assets Percentage

Year	Distilling	Average all manufacturing
1954	6.3	12.4
1955	6.4	15.0
1956	6.3	13.9
1957	7.3	12.8
1958	7.0	9.8
1959	7.9	11.6
1960	7.4	10.6
1961	8.1	9.9
1962	7.8	10.9
1963	8.0	11.5

(Source: Economic Department, First National City Bank, N. Y., N. Y., 1964.)

10. In 1963, 53 different industries among the 65 industries (3,934 corporations) analyzed—from autos and trucks (19.6% return) to lumber and wood products (8.1%)—had higher earnings than distilling. (Source: *Id.*)

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11. Of singular significance in the distilling industry, unlike other industries in the private sector of our national economy, is the fact that each market (state) is non-competitive with other markets or states. A distiller, wholesaler, retailer or sales person must be licensed to sell in the state. The license grants no sales privilege beyond the geographical and political boundaries of the state. Each market entered requires a separate license which obligates the licensee to operate in accordance with the particular regulations of the licensing state.

12. The 50 national markets are sharply divided in their treatment of liquor marketing and pricing practices. Seventeen states, the so-called monopoly states, buy distilled spirits from the manufacturers and sell to the public through state-owned package stores.

13. The remaining states are known as the "open" or "license" states. Sixteen of these permit distillers, importers and wholesalers to price in response to traditional free market factors.

14. Sixteen other states impose some restrictions upon pricing at the wholesale or retail levels, but none so regulates the distiller to wholesaler transaction. Only one state, Kansas, has previously employed maximum price restrictions. It is my understanding that the Kansas act has been declared unconstitutional. Several in this group of 16 require distillers and wholesalers to file a schedule of their prices, but this requirement does not impinge upon the right to set the price as the seller may choose.

15. Still other states in this group of 16 require wholesalers and retailers to abide by a state-imposed minimum markup. The purpose for this system is to prevent price wars which disrupt competition and encourage harmful social practices.

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16. Of equal significance is the existence of non-competitive marketing areas within a state that make up the total sales potential and per capita consumption within the state. Thus the consumption pattern of New York City (Scotches, cocktails, premium products) differs radically from that of the industrial area of Buffalo (blends, bourbons, Canadian). The result is that within each market (state) distillers/wholesalers are confronted with different competitive problems reflective of conditions prevailing in each particular area of the market. This is evidenced by acceptance or rejection of particular brands, rising or falling employment, increase or decrease in weekly earnings, changes in retail sales trends, changes in size of bottle purchased (pint, fifth, quart), change in price-line bought.

17. Mandated in the new liquor pricing act is the requirement that any higher marketing costs (advertising, promotion, selling) necessary in any market other than New York to create sales in such markets must be given a dollar and cents expression in the form of a lower case price to all New York wholesalers and/or retailers. This applies regardless of (i) the competitive conditions that produced the higher costs, (ii) the case volume sold, or (iii) the non-competitive nature of the sale in relation to sales to New York wholesalers. This concept is the product of inverted thinking, namely that the ability of distillers and wholesalers selling in New York to service their markets profitably is premised upon the effectiveness or ineffectiveness of a distiller or wholesaler in selling his brands in markets which are non-competitive with New York.

18. The new legislation also ignores cost variations by requiring New York "related person" wholesalers to sell to retailers at a price no higher than the lowest price charged by "related person" wholesalers elsewhere in the United States. Differences in operating expenses between New York wholesalers and those elsewhere are also disregarded.

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19. In 1963 upstate New York wholesalers had operating expenses of 11.57% of net sales and net profits (before taxes) of .66% of such sales. Metropolitan New York City wholesalers had expenses of 10.88% and net profits (before taxes) of .76%. Nationally the figures averaged 9.94% and 1.29% respectively. In Florida expenses were only 7.34% and profits 1.52%; in Chicago 8.71% and 1.11% and in Missouri 9.63% and 1.11%. (See Appendix D.)

20. From these figures it can be seen that wholesalers in other states, with lower operating expenses, will be able to reduce prices to a level which would seriously impair or eliminate the profit margins of New York wholesalers forced to give the same price. A statute devised to ensure a high degree of competition but which has such a result has no support in economic theory. Forcing New York "related person" wholesalers to sell at a price no higher than the lowest charged by independent "related person" wholesalers in other states without regard to differences in operating expenses and profits can only result in eliminating the marginal New York wholesaler and thus reducing the vigor of competition by narrowing the number of participants. In this respect the new act would appear to be economically self-defeating.

21. The continual and ever-changing nature of these marketing problems emphasizes the inability of any distiller/wholesaler to control sufficiently his distribution costs in markets remote from the New York market. The maintenance of a fixed sales budget policy which will ensure that the distillers'/wholesalers' "price" (as defined by Section 9 of Ch. 531) in other states will not fall below the prevailing price for their products in New York is impracticable. Since it is axiomatic that distillers/wholesalers must come to grips with their competitive problems as they find them in particular markets, it follows that no one pricing policy will serve to solve all sales problems in all markets.

[fol. 250]

22. The very complexities of the problems inherent in distillers'/wholesalers' efforts to out-perform competition place a premium on the need of distillers/wholesalers to be flexible in their operations if they are to meet and solve the problems posed by competition. The need of distillers/wholesalers to readjust their sales budgets to meet the requirements of markets is ever present.

23. Hence, for New York State to mandate that all such adjustments in distillers'/wholesalers' sales strategies and sales budgets must be reflected in allocations of such adjustments to the price distillers may charge New York wholesalers or wholesalers may charge New York retailers is tantamount to the usurpation of managerial prerogatives and responsibilities of such distillers/wholesalers.

24. To penalize management for decisions made to meet competitive problems in markets that are remote and non-competitive to New York because such decisions may be expressed in higher sales costs to the distiller is contrary to any known principle related to our free enterprise society.

25. This legislation, failing as it does to consider marketing, cost and pricing problems that prevail in this industry as in any other, does not accord with current anti-trust theory nor does it seem possible for the industry to comply with it without drastically altering its operational methods.

(Sworn to by Frank T. Hypps, October 25, 1964.)

[fol. 251]

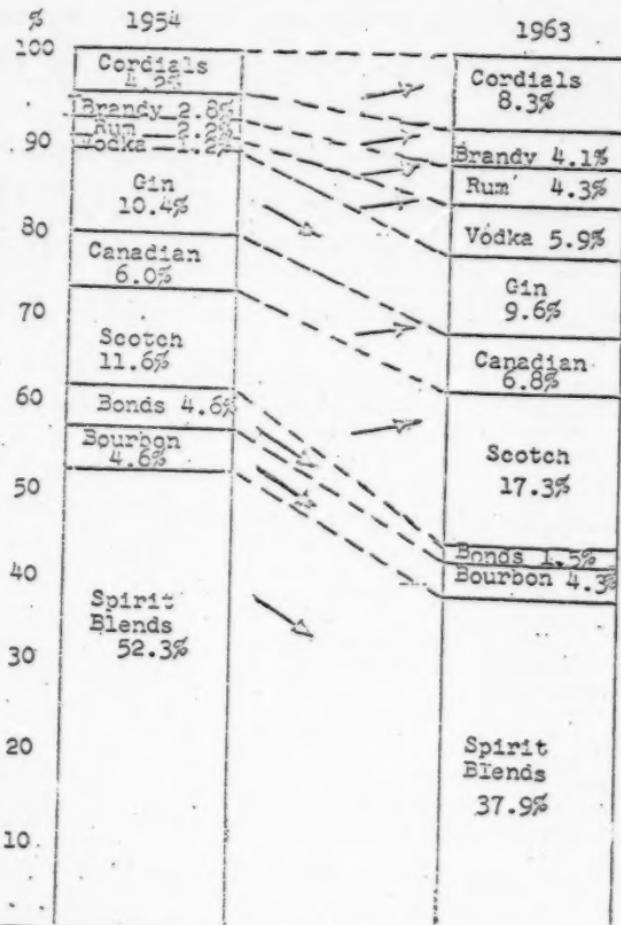
**APPENDICES A, B, C AND D, ANNEXED TO
AFFIDAVIT OF FRANK T. HYPPS**

APPENDIX A

NEW YORK STATE
DISTILLED SPIRITS

Percentaze Change

Shares of Total
by
Product Types
1954 vs. 1963



Source: "Annual Statistical Review," The Distilled Spirits Institute, 1964.

APPENDIX B

A comparison of the Leading Whisky Brands, 1954 versus 1963, shows the intensity of brand competition and shifts in consumer acceptance of the various product types.

Among the 20 Leading Brands in 1954 six brands disappeared from the list by 1963. All but one brand changed sales rank. Five of the 1954 brands showed case decreased in relation to 1963. Nine brands in 1963 showed increases over their 1954 sales. Six brands not among the 20 Leading Brands in 1954 appeared among the leaders in 1963.

In 1954 the 20 top-selling brands were: Blends 10; Canadians 2; Bonds 1; Bourbons 7. In 1963 the 20 leaders were: Blends 9; Canadians 2; Bourbons 7; Scotches 2.

[fol. 253]

APPENDIX BLEADING WHISKY BRANDS - 1954 VERSUS 1963

<u>Rank</u>	<u>Cases</u>	<u>Brand Name</u>	<u>Marketer</u>	<u>Product Type</u>
<u>1954</u>				
1	7,250	Seagram's 7 Crown	Seagram	Blend
2	2,950	Calvert Res.	Seagram	Blend
3	2,800	Schenley Res.	Schenley	Blend
4	2,725	Imperial	Hiram Walker	Blend
5	1,750	Corby's	Hiram Walker	Blend
6	1,450	Seagram's V.O.	Hiram Walker	Blend
7	1,400	Canadian Club	Seagram	Canadian
8	1,250	Early Times	Hiram Walker	Canadian
9	1,250	Old Crow	Brown-Forman	Bourbon
10	1,100	P.M.	National	Bourbon
11	1,050	Carstairs	National	Blend
12	1,025	Four Roses	Seagram	Blend
13	900	Old Stagg	Seagram	Blend
14	875	Paul Jones	Schenley	Bourbon
15	850	Old Sunny Brook	Seagram	Blend
16	825	Fleischmann's Pfd.	National	Bourbon
17	725	J. W. Dant	Fleischmann	Blend
18	715	Jim Beam	Schenley	Blend
19	660	Echo Spring	James B. Beam	Bourbon
20	655	Ancient Age	Schenley	Bourbon

(Source: Business Week, Issue 1/9/54)

<u>1963</u>	1	7,350	Seagram's 7 Crown	Seagram	Blend
	2	2,450	Seagram's VO	Seagram	Canadian
	3	2,325	Canadian Club	Walker	Canadian
	4	2,225	Old Crow	National *	Bourbon
	5	2,225	Imperial	Walker	Blend
	6	1,925	Jim Beam	Beam	Bourbon
	7	1,800	Calvert Extra	Seagram	Blend
	8	1,525	Ancient Age	Schenley	Bourbon
	9	1,500	Schenley Reserve	Schenley	Blend
	10	1,475	Early Times	Brown-Forman	Bourbon
	11	1,350	Ten High	Walker	Bourbon
	12	1,300	Fleischmann Pfd.	Fleischmann	Bourbon
	13	1,300	Cutty Sark	Buckingham	Blend
	14	1,275	Kessler	Seagram	Scotch
	15	1,250	Corby's Reserve	Walker	Blend
	16	1,200	Old Taylor	National	Blend
	17	1,200	Four Roses	Seagram	Bourbon
	18	1,125	J & B	Paddington	Blend
	19	875	Kentucky Gentleman	Barton	Scotch
	20	850	Old Sunny Brook	National	Bourbon

(Source: Business Week, Issue 2/22/64)

[fol. 254]

APPENDIX C

Distilling Companies Included in Studies
of First National City Bank, New York,
New York (Average Annual Percentage Rates
of Net Income after Taxes to Net Assets of
Leading Manufacturing Corporations, 1963)

Distillers Corporation Seagrams, Ltd., Montreal, Canada
National Distillers & Chemical Corporation, New York, N. Y.
Hiram Walker - Gooderham & Worts, Ltd., Walkerville,
Ontario, Canada
Schenley Industries, Inc., New York, N. Y.
American Distilling Company, New York, N. Y.

Publicker Industries, Incorporated, Philadelphia, Pa.
Heublein, Inc., Hartford, Conn.
Brown-Forman Distillers, Louisville, Ky.
Beam (James B.) Distilling Company, Chicago, Ill.
Barton Distilling Co., Chicago, Ill.

Glenmore Distilleries Company, Louisville, Ky.
Taylor Wine Co. Inc., Hammondsport, N. Y.
Arrow Liqueurs Corporation, Detroit, Michigan
Jacquin (Charles) et Cie., Inc., Philadelphia, Pa.
Mohawk Liqueur Corporation, Detroit, Michigan

[fol. 255]

DISTILLERS - NET GAIN TO NET WORTH

	(Thous.) Net Income (after taxes)	(Thous.) Net Worth	\$ Return Net Worth	(Thous.) Annual Sales
--	---	-----------------------	------------------------	-----------------------------

SCHEINLEY INDUSTRIES INC.

1953	10,538	273,447	3.846%	400,395
1962	7,457	259,331	2.763%	370,495
1961	12,372	267,923	4.617%	405,936
1950	8,045	261,690	3.074%	351,549
1959	8,065	269,047	3.005%	450,039
1953	14,271	252,443	5.653%	458,781
1957	10,966	241,030	4.549%	469,989
1956	8,439	234,401	3.599%	404,162
1955	6,117	229,799	2.661%	411,732
1954				

DISTILLERS CORPORATION
SEAGRAMS, LTD.

1953	34,259	464,850	7.369%	864,522
1962	31,613	446,775	7.075%	820,412
1961	30,944	459,392	6.735%	794,234
1950	28,367	411,521	6.892%	768,229
1959	27,131	398,651	6.805%	731,353
1953	25,617	386,847	6.621%	704,530
1957	25,401	376,574	6.745%	746,330
1956	23,023	362,464	6.351%	732,138
1955	31,002	354,311	8.749%	735,679
1954				

NATIONAL DISTILLERS &
CHEMICAL CORPORATION

1953	22,811	376,469	6.059%	766,866
1962	24,226	374,576	6.467%	775,057
1961	23,132	358,721	6.273%	748,053
1950	21,415	357,632	5.987%	580,172
1959	26,347	308,175	8.549%	578,299
1958	20,103	295,416	6.804%	524,310
1957	23,024	287,057	8.0204%	538,525
1956	22,633	275,510	8.214%	543,100
1955	14,618	256,912	5.689%	500,192
1954				
1953				

[fol. 256]

	(Thous.) Net Income (after taxes)	(Thous.) Net Worth	\$ Return Net Worth	(Thous.) Annual Sales
--	---	-----------------------	------------------------	-----------------------------

HIRAM WALKER-COODERHAM
& WORCS., LTD.

1953	29,644	273,373	11.68%	478,783
1952	27,706	240,500	11.52%	469,267
1951	26,353	231,114	11.40%	449,382
1950	25,050	220,135	11.37%	440,153
1949	23,604	210,633	11.24%	412,122
1953	21,845	205,143	10.75%	384,028
1957	22,478	195,762	11.46%	395,182
1955	21,079	186,617	11.29%	370,928
1955	19,347	177,175	11.85%	341,213
1954				
1953				

AMERICAN DISTILLING COMPANY

1953	2,832	26,825	10.74%	27,087
1952	2,699	25,089	10.75%	26,245
1951	2,481	23,486	10.56%	25,493
1950	2,275	21,980	10.35%	24,018
1939	1,933	20,495	9.80%	22,522
1953	1,649	19,256	8.56%	19,710
1957	1,495	18,293	8.17%	18,826
1956	1,333	17,550	7.59%	17,302
1955	1,153	17,213	6.61%	16,267
1954				
1953				

PUBLICKER INDUSTRIES INCORPORATED

1963	417	85,213	.4893%	143,222
1962	(2,505)	85,116	(2.944%)	128,881
1951	89	83,866	.1001%	134,383
1950	2,027	92,131	2.2001%	123,383
1959	{ 2,113 }	90,821	{ 2.326% }	115,297
1958	{ 1,955 }	93,891	{ 2.0802% }	132,652
1957	{ 139 }	93,420	{ .1441% }	140,572
1956	293	97,171	.3015%	159,585
1955	(1,809)	97,155	(1.861%)	145,501
1954				
1953				

[fol. 257]

	(Thous.) Net Income (after taxes)	(Thous.) Net Worth	% Return Net Worth	(Thous.) Annual Sales
--	---	-----------------------	-----------------------	-----------------------------

PEUBLIEN, INC.

1953	5,022	30,931	16.236%	122,234
1952	4,407	28,453	15.463%	116,142
1951	3,815	25,692	14.845%	108,281
1950	3,556	22,892	15.533%	103,169
1949	2,653	14,728	14.007%	87,647
1948	2,30			87,839
1947	2,411			82,054
1946	2,177			68,544
1955 (10 mo)	657			37,222
1954				
1953				

BROWN-FORMAN DISTILLERS CORP.

1953	7,285	58,859	12.377%	121,078
1952	6,647	53,403	12.446%	111,207
1951	5,526	43,397	11.418%	106,907
1950	4,403	41,139	10.714%	101,697
1949	3,567	33,329	9.306%	92,445
1948	2,423	36,099	6.712%	91,476
1947	2,530	24,939	7.230%	97,383
1946	2,940	33,722	8.718%	77,720
1955	2,646	30,675	8.625%	70,781
1954				
1953				

BEAM (JAMES B.) DISTILLING COMPANY

1953	5,903	33,054	17.436%	86,447
1952	5,475	30,350	18.042%	85,082
1951	4,873	25,394	19.189%	82,462
1950	4,276	21,144	20.223%	79,452
1949	3,829	17,753	21.511%	69,790
1948	3,151	14,130	22.300%	64,794
1947	2,451	11,368	23.560%	62,590
1946	2,244	9,153	26.695%	52,517
1955	1,807	7,118	25.386%	39,826
1954				
1953				

[fol. 258]

	(Thous.) Net Income (after taxes)	(Thous.) Net Worth	% Return Net Worth	(Thous.) Annual Sales
<u>BARTON DISTILLING COMPANY</u>				
1953	1,461	13,756	10.620%	79,831
1952	1,902	12,434	15.296%	70,533
1951	1,630	10,596	17.251%	63,472
1950	1,458	8,548	17.056%	72,590
1959	1,271	7,166	17.736%	55,885
1953	615	5,753	10.680%	39,691
1957				
1956				
1955				
1954				
1953				
<u>GLENMORE DISTILLERS COMPANY</u>				
1953	1,235	32,835	3.761%	67,843
1962	830	32,232	2.725%	65,359
1951	1,637	32,109	5.093%	68,773
1950	1,538	31,310	5.007%	71,201
1959	1,737	30,442	5.705%	70,809
1958	1,837	29,342	6.260%	69,185
1957	1,520	23,122	5.405%	67,376
1956	826	27,116	3.046%	65,321
1955	722	25,804	2.693%	58,193
1954				
1953				
<u>TAYLOR WINE CO. INC.</u>				
1953	1,623	12,030	13.491%	17,038
1952	1,354	10,703	12.644%	13,720
1951	1,071	9,663	11.083%	11,437
1950	851	8,660	9.826%	10,084
1959	838	7,854		8,042
1958	649			7,797
1957				
1956				
1955				
1954				
1953				

[fol. 259]

	(Thous.) Net Income (after taxes)	(Thous.) Net Worth	% Return Net Worth	(Thous.) Annual Sales
--	---	-----------------------	-----------------------	-----------------------------

ARROW LIQUEURS CORPORATION

1953	441	3,877	11.37%	15,224
1952	402	3,520	11.42%	13,926
1951	366	3,293	11.46%	12,623
1950		2,894		
1959	343	2,674	12.82%	12,520
1958	265	2,374	12.00%	11,768
1957	374	2,447	17.41%	12,912
1956	339	1,613	18.64%	12,057
1955	280	1,517	18.45%	10,034
1954				
1953				

JACQUIN (CHARLES) ET CIE, INC.

1953	279	1,707	16.34%	9,807
1952	260	1,510	17.21%	8,744
1951	193	1,105	17.45%	7,436
1950	149	903	16.50%	7,047
1959	92	754	12.20%	6,322
1958	71			6,270
1957	65			6,106
1956	51			5,020
1955				
1954				
1953				

KONAWK LIQUOR CORPORATION

1953	259	2,035	12.90%	7,764
1952	170	1,944	8.74%	7,088
1951	211	1,803	11.70%	7,339
1950	203	1,451	13.95%	7,283
1959	141	1,305	10.80%	6,011
1958	159	1,104	12.50%	5,802
1957	162	1,014	17.94%	5,823
1956	136	973	13.97%	5,059
1955	105	845	12.42%	3,906
1954				
1953				

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[fol. 260]

APPENDIX D

Annual Survey of Operations

1963

New York - P. 4

Prepared by

the

School of Commerce and Finance

Saint Louis University

for

Wine and Spirits Wholesalers of America, Inc.

[fol. 261]

This report is based on 17 questionnaires representing 20 establishments. The comparisons are based on all firms reporting in 1963 and on the average firms of the same sales volume classifications as those reporting from your state.

[fol. 262]

Balance Sheet Comparisons

			1963	
	<u>All Firms Reporting</u>	<u>Range of Experience</u>	<u>New York</u>	<u>Range of Experience</u>
Cash	5.89	.04 - 38.04	7.36	.79 - 18.56
Receivables-Net	30.60	.00 - 64.85	24.04	16.22 - 33.46
Inventories	46.54	7.01 - 69.36	55.96	36.56 - 70.95
Warehouse Receipts	4.36	.00 - 65.76	.68	.00 - 8.79
Other Current Assets	1.64	.00 - 45.63	2.26	.00 - 17.67
<u>Total Current Assets</u>	<u>89.03</u>	<u>34.02 - 99.82</u>	<u>90.30</u>	<u>67.50 - 97.56</u>
Investments	3.55	.00 - 65.52	2.69	.00 - 29.29
Funds	.13	.00 - 8.01	.04	.00 - .51
Fixed Assets-Net	5.79	.00 - 34.51	5.79	1.23 - 17.81
Intangibles	.26	.00 - 8.40	.17	.00 - 1.97
Deferred Items	1.24	.00 - 22.98	1.01	.00 - 3.42
<u>Total Assets</u>	<u>100.00</u>		<u>100.00</u>	
Current Liabilities	56.07	5.11 - 103.08	54.87	24.95 - 81.00
Fixed Liabilities	6.23	.00 - 87.67	2.73	.00 - 16.64
Deferred Income	.18	.00 - 10.18	.01	.00 - .15
Reserves	.24	.00 - 9.05	.18	.00 - 3.52
<u>Total Liabilities</u>	<u>62.72</u>	<u>5.11 - 158.80</u>	<u>57.79</u>	<u>31.56 - 81.00</u>
<u>Net Worth</u>	<u>37.28</u>	<u>(58.00) - 99.13</u>	<u>42.21</u>	<u>19.00 - 68.44</u>
<u>Total Liab. & Capital</u>	<u>100.00</u>		<u>100.00</u>	

Selected Ratios

		1963		
	<u>All Firms</u>	<u>Range of Experience</u>	<u>Comp.</u>	<u>New York</u>
Current Ratio	1.59	.67 - 110.48	1.70	1.65
Stock Turnover	6.66	2.00 - 16.14	6.86	5.93
Closing Inv. as a Per Cent of Beg. Inv.	100.52	45.03 - 343.00	100.81	103.07
Return on Net Worth	12.28	(2587.11)- 177.02	12.75	6.93
Return on Total Assets	4.58	(16.32)- 54.14	5.19	2.92

[fol. 263]

Income Statement Comparisons

		1963		
	All Firms	Range of Experience	Comp.	New York
55	Net Sales	100.00	100.00	100.00
48	Cost of Goods Sold	88.77	68.63 - 96.80	88.71
50	Gross Profit	11.23	3.20 - 31.37	11.29
56	Operating Expenses	9.94	1.77 - 33.45	9.87
51	Net Operating Profit	1.29	(5.43) - 7.68	1.42
52				.66
42				(.15) - 2.12

Operating Expense Comparisons

		1963		
	All Firms	Range of Experience	Comp.	New York
33	Total Expenses	9.942	1.767 - 33.454	9.868
11	Administrative	2.869	1.212 - 13.148	3.001
11	Selling	3.914	.109 - 14.542	3.716
31	Shipping	1.374	.000 - 5.690	1.455
33	Warehouse	.699	.000 - 2.356	.637
33	Occupancy	.521	.033 - 2.787	.538
25	Other	.565	(.438) - 2.232	.521
				.356
				.065 - .914

[fol. 264]

Operating Expenses (Detailed)

	1963		1963	
	All Firms	New York	All Firms	New York
<u>Administrative Expenses</u>	<u>2.869</u>	<u>3.602</u>	<u>Occupancy Expenses</u>	<u>.521</u>
Executive Salaries	.662	.950	Salaries & Wages	.018 .016
Executive Travel	.082	.126	Real Estate Taxes	.043 .030
Office Salaries	.867	1.032	Depreciation on Bldgs.	.056 .053
Office Supplies	.111	.188	Rent	.243 .313
Office Equipment	.120	.119	Insurance on Buildings	.019 .026
Business Licenses	.063	.129	Light, Heat & Power	.057 .071
Postage	.028	.055	Repairs & Maintenance	.041 .050
Telephone & Telegraph	.122	.145	Outside Storage	.017 .022
Assoc. Dues & Subscriptcns.	.070	.060	Other	.025 .009
Gen'l. Insurance, Bonding	.146	.165		
Contributions	.040	.032		
Legal and Auditing	.088	.097		
Other	.470	.504		
<u>Selling Expenses</u>	<u>3.914</u>	<u>4.496</u>	<u>Warehouse Operation</u>	
			<u>Expense</u>	<u>.699</u>
Managers & Supervisors	.547	.610	Salaries & Wages	.595 .677
Salesman's Salaries	2.602	3.088	Supplies & Equipment	.043 .044
Salesman's Travel Exp.	.252	.458	Other	.061 .034
Advertising & Promotion	.350	.237		
Other	.163	.103		
<u>Shipping Expenses</u>	<u>1.374</u>	<u>1.757</u>	<u>Other Expenses</u>	<u>.565</u>
Salaries & Wages	.831	.526	Interest Paid	.260 .130
Common & Contract Del.	.166	1.030	Loss From Bad Dabts	.126 .067
Rental of Equipment	.103	.031	Personal Property Taxes	.053 *
Oper. & Maint. of Equipmt.	.161	.105	Other	.096 .159
Depreciation of Equipment	.067	.034		
Other	.046	.031		

[fol. 263]

Sales, Profits and Expenses Per Invoice(Based on returns from 14 firms in your State)

		\$ Per Invoice	
	<u>All Firms</u>	<u>Comp.</u>	<u>New York</u>
Net Sales	116.27	110.26	98.15
Gross Profit	13.16	12.48	12.17
Total Expenses	11.64	10.95	11.42
Net Profit	1.52	1.53	.75
Selling Expenses	4.57	4.12	4.39
Salesman's Salaries	3.06	2.56	3.04
Salesman's Travel Expense	.26	.35	.44
Shipping & Delivery Expense	1.63	1.68	1.70
Occupancy Expense	.63	.61	.60
Warehousing Expense	.83	.69	.77
Warehousing Salaries	.69	.59	.68
Administrative Expense	3.25	3.23	3.56
Office Salaries	1.06	.93	1.07
Other Expenses	.73	.62	.40

[fol. 266]

Employment Statistics

	All Firms	Comp.	New York
Total Employees	50.3	50.6	54.5
Sales Employees	19.8	20.3	26.4
Shipping & Delivery Employees	9.6	9.4	5.5
Warehouse & Occupancy Employees	7.2	7.4	6.4
Gen'l & Administrative Employees	13.7	13.5	16.2
Sales Per Employee (\$ 000)	134.7	136.9	137.7
Sales Per Sales Employees (\$ 000)	341.3	347.4	284.0
Sales Per Shipping and Delivery Employee (\$ 000)	708.7	742.1	1371.6
Sales Per Warehouse & Occupancy Employee (\$ 000)	943.6	919.7	1171.6
Sales Per General & Administrative Employee (\$ 000)	494.8	511.4	462.8

[fol. 267]

Annual Survey of Operations

1963

New York City - P.4

Prepared by

the

School of Commerce and Finance

Saint Louis University

for

Wine and Spirits Wholesalers of America, Inc.

[fol. 268]

This report is based on 4 questionnaires representing 8 establishments. The comparisons are based on all firms reporting in 1963 and on the average firms of the same sales volume classifications as those reporting from your state.

[fol. 269]

Balance Sheet Comparisons

1963

	All Firms Reporting	Range of Experience	New York City	Range of Experience
Cash	5.89	.04 - 38.04	8.63	8.02 - 10.34
Receivables - Net	20.60	.00 - 64.85	33.26	21.49 - 34.54
Inventories	46.54	7.01 - 89.36	53.72	52.92 - 62.81
Warehouse Receipts	4.36	.00 - 66.76	-----	----- - -----
Other Current Assets	1.64	.00 - 45.63	.53	.00 - 1.95
<u>Total Current Assets</u>	<u>89.03</u>	<u>34.02 - 99.82</u>	<u>96.19</u>	<u>94.64 - 98.86</u>
Investments	3.55	.00 - 65.52	.59	.00 - .95
Funds	.13	.00 - 8.01	--	----- - -----
Fixed Assets - Net	5.79	.00 - 34.51	2.72	1.14 - 3.62
Intangibles	.26	.00 - 8.40	.02	.00 - .02
Deferred Items	1.24	.00 - 22.98	.48	.00 - 3.99
<u>Total Assets</u>	<u>100.00</u>		<u>100.00</u>	
Current Liabilities	56.07	5.11 - 103.08	75.63	70.21 - 85.25
Fixed Liabilities	6.23	.00 - 87.67	-----	----- - -----
Deferred Income	.18	.00 - 10.18	-----	----- - -----
Reserves	.24	.00 - 9.05	-----	----- - -----
<u>Total Liabilities</u>	<u>62.72</u>	<u>5.11 - 158.80</u>	<u>75.63</u>	<u>70.21 - 85.25</u>
Net Worth	37.28	(58.80) - 99.13	24.37	14.75 - 29.79
<u>Total Liabilities and Capital</u>	<u>100.00</u>		<u>100.00</u>	

[fol. 270]

Selected Ratios

		1963			
	All Firms	Range of Experience	Comp.	New York City	Range of Experience
Current Ratio	1.59	.67 - 110.48	1.53	1.27	1.15 - 1.38
Stock Turnover	6.66	2.33 - 16.14	6.66	7.01	5.93 - 9.58
Closing Inv. as a Per Cent of Beg. Inv.	100.52	45.03 - 343.00	102.80	134.60	116.91 - 143.11
Return on Net Worth	12.28	(2587.11) - 177.02	12.57	28.54	25.70 - 59.79
Return on Total Assets	4.58	(16.32) - 56.14	3.38	6.96	4.55 - 10.37

Income Statement Comparisons

		1963			
	All Firms	Range of Experience	Comp.	New York City	Range of Experience
Net Sales	100.00		100.00	100.00	
Cost of Goods Sold	88.77	68.63 - 96.80	88.84	88.36	87.28 - 89.91
Gross Profit	11.23	3.20 - 31.37	11.16	11.64	10.09 - 12.72
Operating Expenses	9.94	1.77 - 33.45	9.98	10.88	9.23 - 11.73
Net Operating Profit	1.29	(5.43) - 7.68	1.18	.76	(.27) - 2.02

[fol. 271]

Operating Expense Comparisons

	1963			
	All Firms	Range of Experience	Comp.	New York City
Total Expenses	9.942	1.767 - 33.454	9.984	10.875
Administrative	2.869	1.212 - 13.148	2.756	2.526
Selling	3.914	.109 - 14.642	4.088	4.900
Shipping	1.374	.000 - 5.690	1.382	1.718
Warehouse	.699	.000 - 2.356	.685	.786
Occupancy	.521	.033 - 2.787	.483	.419
Other	.565	(.438) - 2.232	.590	.527
				9.226 - 11.733
				1.212 - 3.472
				4.528 - 5.051
				1.589 - 1.795
				.550 - .955
				.272 - .492
				.104 - .957

[fol. 272]

Operating Expenses (Detailed)

	1963			1963	
	All Firms	New York City		All Firms	New York City
<u>Administrative Expenses</u>	<u>2.869</u>	<u>2.526</u>	<u>Occupancy Expenses</u>	<u>.521</u>	<u>.419</u>
Executive Salaries	.662	.450	Salaries & Wages	.018	-
Executive Travel	.082	.089	Real Estate Taxes	.043	.024
Office Salaries	.867	.647	Depreciation on Bldgs.	.058	.017
Office Supplies	.111	.084	Rent	.243	.221
Office Equipment	.120	.062	Insurance on Buildings	.019	-
Business Licenses	.063	.050	Light, Heat & Power	.057	.049
Postage	.028	.028	Repairs and Maintenance	.041	.045
Telephone & Telegraph	.122	.105	Outside Storage	.017	.056
Assoc. Dues & Subscripts.	.070	.017	Other	.025	.007
Gen'l. Insurance, Bonding	.146	.085			
Contributions	.043	.024	<u>Warehouse Operation</u>		
Legal & Auditing	.088	.058	<u>Expense</u>	<u>.699</u>	<u>.736</u>
Other	.470	.827	Salaries & Wages	.595	.723
<u>Selling Expenses</u>	<u>3.914</u>	<u>4.900</u>	Supplies & Equipment	.043	.041
Managers & Supervisors	.547	.329	Other	.061	.022
Salesmen's Salaries	2.602	3.706	<u>Other Expenses</u>	<u>.565</u>	<u>.537</u>
Salesmen's Travel Exp.	.252	.352	Interest Paid	.260	.007
Advertising & Promotion	.350	.319	Loss From Bad Debts	.126	.061
Other	.163	.194	Personal Propty. Taxes	.083	-
<u>Shipping Expenses</u>	<u>1.374</u>	<u>1.717</u>	Other	.096	.459
Salaries & Wages	.831	1.479			
Common & Contract Deliv.	.156	.023			
Rental of Equipment	.103	.189			
Oper. & Maint. of Equipmt.	.161	.011			
Depreciation of Equipmt.	.067	.008			
Other	.046	.007			

[fol. 273]

Sales, Profits and Expenses Per Invoice(Based on returns from 3 firms in your city)

	\$ Per Invoice		
	All Firms	Comp	New York City
Net Sales	116.27	122.96	131.93
Gross Profit	13.16	13.81	15.53
Total Expenses	11.64	12.29	13.49
Net Profit	1.52	1.52	2.04
Selling Expenses	4.57	5.09	6.45
Salesmen's Salaries	3.06	3.53	4.99
Salesmen's Travel Expense	.26	.22	.37
Shipping & Delivery Expense	1.63	1.69	2.19
Occupancy Expense	.63	.61	.48
Warehousing Expense	.83	.86	.87
Warehousing Salaries	.69	.72	.78
Administrative Expense	3.25	3.22	2.39
Office Salaries	1.06	1.11	.98
Other Expenses	.73	.82	1.11

[fol. 274]

EMPLOYMENT STATISTICS

	All Firms	Comp.	New York City
Total Employees	<u>50.3</u>	<u>122.0</u>	<u>109.3</u>
Sales Employees	19.8	49.7	50.7
Shipping & Delivery Employees	9.6	22.4	27.0
Warehouse & Occupancy Employees	7.2	16.7	11.3
Gen'l & Administrative Employees	13.7	33.2	20.3
Sales Per Employee (\$ 000)	134.7	137.9	146.0
Sales Per Sales Employee (\$ 000)	341.3	344.6	319.3
Sales Per Shipping and Delivery Employee (\$ 000)	708.7	725.9	599.1
Sales Per Warehouse and Occupancy Employee (\$ 000)	943.6	1036.9	1427.3
Sales Per General and Administrative Employee (\$ 000)	494.8	514.5	795.6

[fol. 275]

Annual Survey of Operations

1963

Florida - P.4

Prepared by

the

School of Commerce and Finance

Saint Louis University

for

Wine and Spirits Wholesalers of America, Inc.

[fol. 276]

This report is based on 12 questionnaires representing 17 establishments. The comparisons are based on all firms reporting in 1963 and on the average firms of the same sales volume classifications as those reporting from your state.

[fol. 277]

Balance Sheet Comparisons

1963

	All Firms Reporting	Range of Experience	Florida	Range of Experience
Cash	5.89	.04 - 38.04	5.02	.90 - 16.59
Receivables - Net	30.60	.00 - 64.85	20.42	10.47 - 30.98
Inventories	46.54	7.01 - 89.36	63.69	40.13 - 80.47
Warehouse Receipts	4.36	.00 - 66.76	2.01	.00 - 12.86
Other Current Assets	1.64	.00 - 45.63	.33	.00 - 1.90
<u>Total Current Assets</u>	<u>89.03</u>	34.02 - 99.82	<u>91.47</u>	75.73 - 98.24
Investments	3.55	.00 - 65.52	.29	.00 - 2.96
Funds	.13	.00 - 8.01	.03	.00 - .29
Fixed Assets - Net	5.79	.00 - 34.51	6.38	.10 - 16.61
Intangibles	.26	.00 - 8.40	.80	.00 - 6.84
Deferred Items	1.24	.00 - 22.98	1.03	.00 - 3.95
<u>Total Assets</u>	<u>100.00</u>		<u>100.00</u>	
Current Liabilities	56.07	5.11 - 103.08	69.94	12.50 - 89.04
Fixed Liabilities	6.23	.00 - 87.67	2.14	.00 - 6.58
Deferred Income	.18	.00 - 10.18	1.06	.00 - 11.35
Reserves	.24	.00 - 9.05	.20	.00 - 1.41
<u>Total Liabilities</u>	<u>62.72</u>	5.11 - 158.80	<u>73.34</u>	12.50 - 94.95
<u>Net Worth</u>	<u>37.28</u>	(58.80) - 99.13	<u>26.66</u>	5.05 - 87.50
<u>Total Liabilities and Capital</u>	<u>100.00</u>		<u>100.00</u>	

[fol. 278]

Selected Ratios

			1963		
	<u>All Firms</u>	<u>Range of Experience</u>	<u>Comp</u>	<u>Fla.</u>	<u>Range of Experience</u>
Current Ratio	1.59	.67 - 110.48	1.64	1.31	.94 - 7.70
Annual Rate of Stock Turnover	6.66	2.33 - 16.14	6.94	6.76	4.97 - 9.25
Closing Inv. as Per Cent of Beg. Inventory	100.52	45.03 - 343.00	104.68	106.11	68.63 - 156.18
Return on Net Worth	12.28	(2587.11)- 177.02	13.94	28.01	9.25 - 110.01
Return on Total Assets	4.58	(16.32)- 54.14	4.78	7.47	1.48 - 15.41

Income Statement Comparisons

		1963			
	<u>All Firms</u>	<u>Range of Experience</u>	<u>Comp</u>	<u>Fla.</u>	<u>Range of Experience</u>
Net Sales	100.00		100.00	100.00	
Cost of Goods Sold	88.77	68.63 - 96.80	89.05	91.14	89.58 - 96.80
Gross Profit	11.23	3.20 - 31.37	10.95	8.86	3.20 - 10.42
Operating Exp.	<u>9.94</u>	1.77 - 33.45	9.63	<u>7.34</u>	5.86 - 9.14
Net Operating Profit	<u>1.29</u>	(5.43)- 7.68	1.32	<u>.42</u>	(4.79)- 3.44

[fol. 279]

Operating Expense Comparisons

	1963				
	All Fixms	Range of Experience	Comp	Fla.	Range of Experience
Total Operating Expenses	9.942	1.767 - 33.454	9.627	7.342	5.861 - 9.144
Administrative	2.869	1.212 - 13.148	3.012	2.564	1.329 - 3.497
Selling	3.914	.109 - 14.642	3.540	2.725	2.276 - 4.096
Shipping	1.374	.000 - 5.690	1.442	1.131	.693 - 1.911
Occupancy	.521	.033 - 2.787	.500	.413	.230 - .997
Warehouse	.699	.000 - 2.356	.643	.294	.000 - .992
Other (including Bad Debts)	.565	(.438) - 2.232	.490	.215	.038 - .474

[fol. 280]

Operating Expenses (Detailed)

	1963			1963	
	All Firms	Fla		All Firms	Fla
<u>Administrative Expenses</u>	<u>2.869</u>	<u>2.564</u>	<u>Occupancy Expenses</u>	<u>.521</u>	<u>.413</u>
Executive Salaries	.662	.617	Salaries & Wages	.018	.006
Executive Travel	.082	.106	Real Estate Taxes	.043	.013
Office Salaries	.867	.600	Depreciation on Bldgs.	.058	.072
Office Supplies	.111	.107	Rent	.243	.228
Office Equipment	.120	.066	Insurance on Buildings	.019	.011
Business Licenses	.063	.103	Light, Heat & Power	.057	.043
Postage	.028	.012	Repairs & Maintenance	.041	.029
Telephone & Telegraph	.122	.115	Outside Storage	.017	.008
Assoc. Dues&Subscriptns.	.070	.070	Other	.025	.004
Gen'l. Insurance, Bonding	.146	.141	<u>Warehouse Operation</u>		
Contributions	.040	.038	<u>Expense</u>	<u>.699</u>	<u>.204</u>
Legal and Auditing	.088	.059	Salaries & Wages	.595	.260
Other	.470	.530	Supplies & Equipment	.043	.022
<u>Selling Expenses</u>	<u>3.914</u>	<u>2.725</u>	Other	.061	.014
Managers & Supervisors	.547	.699	<u>Other Expenses</u>	<u>.565</u>	<u>.215</u>
Salesmen's Salaries	2.602	1.464	Interest Paid	.260	.087
Salesmen's Travel Exp.	.252	.206	Loss From Bad Debts	.126	.041
Advertising & Promotion	.350	.295	Personal Proptry. Taxes	.083	.057
Other	.163	.061	Other	.096	.020
<u>Shipping Expenses</u>	<u>1.374</u>	<u>1.131</u>			
Salaries & Wages	.831	.706			
Common &Contract Delvry	.166	.006			
Rental of Equipment	.103	.180			
Oper. & Maint. of Equipmt.	.161	.120			
Depreciation of Equipmt.	.067	.065			
Other	.046	.054			

[fol. 281]

Sales, Profits and Expenses Per Invoice(Based on returns from 11 firms in your State)

		<u>\$ Per Invoice</u>	
	<u>All Firms</u>	<u>Conn.</u>	<u>Florida</u>
Net Sales	116.27	108.02	122.15
Gross Profit	13.16	11.88	10.48
Total Expenses	11.64	10.46	9.14
Net Profit	1.52	1.42	1.34
Selling Expenses	4.57	3.81	3.48
Salesmen's Salaries	3.06	2.26	1.75
Salesmen's Travel Expense	.26	.41	.27
Shipping & Delivry. Expense	1.63	1.64	1.62
Occupancy Expense	.63	.56	.51
Warehousing Expense	.83	.68	.28
Warehousing Salaries	.69	.59	.24
Administrative Expense	3.25	3.20	2.88
Office Salaries	1.06	.91	.82
Other Expenses	.73	.57	.37